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Twombly and Iqbal Should (Finally) Put the Distinction between Intrinsic and Extrinsic Fraud out of Its Misery

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TWOMBLY AND IQBAL SHOULD (FINALLY!) PUT THE DISTINCTION BETWEEN INTRINSIC AND EXTRINSIC FRAUD OUT OF ITS MISERY

*Dustin B. Benham**

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I. INTRODUCTION

THE proliferation of digital evidence and discovery has raised serious questions about litigation fraud in recent years. Legal tabloids are often headlined with the latest example of discovery abuse that resulted in multi-million dollar sanctions. But what about the cases of serious discovery abuse or perjury that neither the opposing party nor the court catch during the litigation? These abuses may very well lead to judgments that do not reflect a result based on the true merits of the case. If a party seeks relief based on fraud within one year from the entry of judgment, Federal Rule of Civil Procedure 60(b) gives the trial court plenary power to vacate the judgment.¹ For fraud discovered outside of one year, however, the district court's powers are more limited, and relief is often contingent upon whether the fraud is deemed intrinsic or extrinsic.² Indeed, a majority of the circuits hold that after one year, a party cannot obtain post-judgment relief based on perjury or discovery abuse because these frauds are *intrinsic*.³ This Article contends that the distinction between intrinsic and extrinsic fraud should be abolished because *Twombly* and *Iqbal* have created an effective pleading-stage screening mechanism to prevent the meritless relitigation of cases.

This Article proceeds in five parts. Part II examines the origins and history of modern post-judgment relief before and after the adoption of Rule 60. Next, Part III explores the distinction between intrinsic and extrinsic fraud in the context of independent actions. Part IV of this Article addresses the rise of plausibility pleading in *Bell Atlantic Corp. v.*

1. See FED. R. CIV. P. 60(b).

2. Compare FED. R. CIV. P. 60(b), with FED. R. CIV. P. 60(d).

3. See, e.g., *Fierro v. Johnson*, 197 F.3d 147, 155 (5th Cir. 1999); *Lindo v. City & Cnty. of S.F., Dep't of Soc. Servs.*, No. 94-15335, 1994 U.S. App. LEXIS 30620, at *3-4 (9th Cir. Oct. 31, 1994); *Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters*, 675 F.2d 1349, 1355-57 (4th Cir. 1982); *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981); *Hanna v. Britton Mfg. Co.*, 62 F.2d 139, 148 (8th Cir. 1932).

Twombly and *Ashcroft v. Iqbal*.⁴ In these cases, the Supreme Court overruled *Conley v. Gibson*, announcing a new pleading paradigm that applies to all civil actions filed in federal court, including judgment-relief actions.⁵ In a move away from notice pleading, the Court held that a civil complaint must *plausibly* allege a cause of action.⁶ Finally, Part V of this Article contends that this increased pleading scrutiny serves as a better screening mechanism for post-judgment fraud claims than the distinction between intrinsic and extrinsic fraud. By screening fraud claims individually, a court can better assess whether the claim could have been raised in the original litigation. Screening cases for this trait results in a better balance between the often competing values of judgments that reflect truth and judgments that are final.

II. THE HISTORY OF RELIEF FROM JUDGMENTS PROCURED BY FRAUD

Throughout legal history, losing parties have sought procedural vehicles through which to bring complaints about the accuracy of judgments or the adequacy of the proceedings that led to those judgments. At common law, courts developed an elaborate writ system to provide this type of relief.⁷ The independent action at equity was also contemplated in these early procedures and provided relief from judgments procured by fraud, among other reasons.⁸ Later, post-judgment relief mechanisms were consolidated under Original Rule 60 in an attempt to modernize and simplify post-judgment relief practice.⁹ After recognizing that Original Rule 60 allowed many ancient, complex procedures to persist, the Rule was amended to further streamline and modernize post-judgment relief practices.¹⁰ The distinction between intrinsic and extrinsic fraud, however, has stubbornly thwarted this trend toward liberalization and simplicity and remains a part of some jurisdictions' post-judgment relief practices more than a century after its unfortunate inception.

4. See generally *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–54 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007).

5. See *Iqbal*, 129 S. Ct. at 1949–54; *Twombly*, 550 U.S. at 556–57. This Article does not address the direct attacks on criminal judgments contemplated by the Federal Rules of Criminal Procedure. In the habeas corpus setting, however, Rule 60 does provide a framework for civil relief from criminal judgments in some situations. See *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010). Indeed, the law surrounding Rule 60 can undoubtedly have life and death significance in habeas cases. See *id.* (affirming the denial of Rule 60 relief in a capital case).

6. See *Iqbal*, 129 S. Ct. at 1949–50; *Twombly*, 550 U.S. at 556.

7. See 12 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE*, § 60 App. 100 (3d ed. 2011) [hereinafter *MOORE'S*].

8. See *id.*

9. See *id.*

10. See *id.*

A. RELIEF FROM FINAL JUDGMENTS BEFORE THE
ADOPTION OF RULE 60

Before Rule 60(b) was adopted, a court could not, in ordinary circumstances, modify or vacate its own judgments after the term in which the court rendered the judgment at issue.¹¹ This limitation extended to both courts of law and equity.¹² As a result of this limitation, courts developed various procedural mechanisms to revisit their judgments.¹³ These procedures included ancient writs and bills whose names, by modern standards, sound like they were stripped from the pages of an ancient spell book. Among the possible avenues to seek post-term relief from a court was the writ of *coram nobis* (or *coram vobis*) (for challenges based on errors of fact that preceded the rendition of judgment), the writ of *audita querela* (for challenges based on errors of fact that preceded the judgment and matters subsequent to judgment, such as discharge), the bill of review, the bill in the nature of a bill of review (both used to challenge decrees in equity based on various grounds, including fraud and newly discovered evidence), and the independent action in equity.¹⁴ Using these ancient remedies, legal sorcerers of the era sought relief from judgments and decrees in the same court that rendered them after that court had lost plenary power to modify or vacate the particular judgment because of the term rule.¹⁵ Ultimately, however, the Federal Rules of Civil Procedure supplanted the ancient remedies.¹⁶ In particular, Federal Rule of Civil Procedure 60 was adopted in an attempt to unify post-judgment relief practice in the federal courts.¹⁷ Even after the adoption of modern Rule 60(b), however, the independent action at equity continues to provide an avenue for relief from judgments obtained by fraud.¹⁸

1. *Vacating Judgments Obtained by Interparty Fraud Through the Independent Action*

Relief from a judgment through the independent action was available when one party committed fraud against another party (interparty fraud)

11. In one example of the limited exceptions to the term rule, a court could modify a judgment from a previous term where a party began the appropriate proceedings during the term in which the court rendered the judgment. See *United States v. Mayer*, 235 U.S. 55, 67 (1914); see also *Del., Lackawanna & W. R.R. v. Rellstab*, 276 U.S. 1, 5 (1928); *In re Metro. Trust Co. of N.Y.*, 218 U.S. 312, 320 (1910).

12. See *Mayer*, 235 U.S. at 67; see also MOORE's, *supra* note 7, at § 60 App. 101, *et seq.* (discussing thoroughly the history of Rule 60(b) and other post-judgment relief methods).

13. See MOORE's, *supra* note 7, at § 60 App. 100; see also *Rellstab*, 276 U.S. at 5; *In re Metro. Trust*, 218 U.S. at 320-21.

14. See, e.g., *Lovejoy v. Murray*, 70 U.S. 1, 12 (1866) (writ of *audita querela*); *Whiting v. Bank of U.S.*, 38 U.S. 6, 13 (1839) (bill of review and bill in the nature of a bill of review); *Pickett's Heirs v. Legerwood*, 32 U.S. 144, 147 (1833) (writ of *coram nobis*); MOORE's, *supra* note 7, at § 60 App. 104 (independent action in equity).

15. See *Mayer*, 235 U.S. at 67-68.

16. See Hollee S. Temple, *Raining on the Litigation Parade: Is it Time to Stop Litigant Abuse of the Fraud on the Court Doctrine?*, 39 U.S.F. L. REV. 967, 972-73 (2005).

17. *Id.*

18. *Id.*

to obtain a judgment against that party. The independent action was a remedy through which various complaints about a judgment, including fraud, could be brought.¹⁹ This procedural device was available in either the court that rendered the prior judgment or another court having competent jurisdiction.²⁰ Generally, parties used the independent action to seek relief when they did not have an opportunity to fully present their claims in the previous litigation because of fraud, mistake, or newly discovered evidence,²¹ among other reasons.²² In particular, an independent action, as opposed to an action predicated solely on the court's inherent power to vacate judgments based on fraud by a judicial officer, could be based on interparty fraud.²³ But the independent action, as opposed to a request for the court to use its inherent power to vacate a judgment, was subject to equitable limitations.²⁴ These limitations included the requirement that a party act diligently in seeking relief through the action, file the action before laches precluded relief, and come to the court with clean hands.²⁵ Importantly, the independent action was available only for interparty *extrinsic* fraud, not *intrinsic* fraud.²⁶

The distinction between intrinsic and extrinsic fraud is rooted in the United States Supreme Court decision *United States v. Throckmorton*.²⁷ In *Throckmorton*, the United States filed a bill in chancery (known in modern terms, and hereinafter referred to, as the independent action in equity) to set aside a twenty-year-old decree made in 1856 by the United States District Court for California.²⁸ The decree confirmed a land grant in California made by the government of Mexico²⁹ to W.A. Richardson.³⁰

19. See *Pickford v. Talbott*, 225 U.S. 651, 657 (1912); see also MOORE's, *supra* note 7, at § 60 App. 100.

20. See *Pickford*, 225 U.S. at 658.

21. A few courts have held that relief for newly discovered evidence may be available by independent action. See *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 597 (5th Cir. 1980). Courts and commentators agree, however, that something beyond the plain Rule 60(b)(2) showing of newly discovered evidence is required to obtain relief. See *id.*; see also MOORE's, *supra* note 7, at § 60.81[4].

22. See *Pickford*, 225 U.S. at 658; see also Thomas D. Clark, Comment, *Rule 60(b): Survey and Proposal for General Reform*, 60 CAL. L. REV. 531, 535 (1972).

23. See *Marshall v. Holmes*, 141 U.S. 589, 601 (1891) (court will enjoin a judgment procured by the fraud of one party against the other). But see *United States v. Throckmorton*, 98 U.S. 61, 68 (1878) (independent action in equity will not lie for interparty fraud where the fraud is intrinsic to the proceedings that led to the original judgment). The distinction between intrinsic and extrinsic fraud and the distinction's impact on the availability of relief in an independent action are discussed in depth, *infra*.

24. See *Pickford*, 225 U.S. at 657; 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2868 (2d ed. 1995) [hereinafter WRIGHT, MILLER & KANE] (noting that the requirements of the independent action were laid out "long before the adoption of the [c]ivil [r]ules").

25. See, e.g., *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 79 (5th Cir. 1970) (stating the equitable requirements); see also *In re Casco Chem. Co.*, 335 F.2d 645, 651 (5th Cir. 1964) (laches applies).

26. See *Throckmorton*, 98 U.S. at 68.

27. See *id.* (discussing the distinction between intrinsic and extrinsic fraud).

28. *Id.* at 62.

29. *Id.* At the time of the alleged grant, Mexico had sovereign control over what became the State of California. See *id.*

30. *Id.*

The independent action sought to overturn the decree in favor of Richardson because he submitted fraudulent, falsified documents in support of his case.³¹

In 1852, Mr. Richardson applied for a confirmation of the land grant to the board of commissioners of private land claims in California.³² Sometime after filing his petition, he became aware that the evidence of his claim was insufficient.³³ So he traveled to Mexico in search of Micheltorena, the former political chief of California when the state was under Mexican control.³⁴ Richardson found Micheltorena and had him sign and falsely backdate a land grant in support of Richardson's land claim.³⁵ Upon his return to the United States, Richardson submitted the falsified land grant, along with the depositions of perjured witnesses in support of the document, to the board of commissioners.³⁶ The board confirmed the grant to Richardson in 1853, and the district court issued a decree again confirming the grant in 1856.³⁷

The Supreme Court declined to overturn the district court's decree, holding that the Court would disturb a decree or judgment procured by fraud only where the fraud is "extrinsic or collateral[] to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."³⁸ Indeed, the Court noted that the falsified land grant from Micheltorena was the central document in the underlying litigation and that the entire, original matter turned on its authenticity and validity.³⁹ Expounding on examples of fraud that could potentially provide a basis for relief, Justice Miller, writing for the Court, observed that fraud could undermine a judgment:

where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case . . . by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side.⁴⁰

Thus, where "there has never been a real contest in the trial or hearing of the case"⁴¹ because of fraud, the fraud is extrinsic and relief will lie.⁴² But where a judgment is merely founded on a forged or falsified docu-

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 68.

39. *See id.*

40. *Id.* at 65-66.

41. *Id.* at 66.

42. *Id.*

ment or perjured testimony, the fraud is intrinsic to the matters tried, and relief is not available from the judgment by independent action.⁴³ Not surprisingly, the distinction between intrinsic and extrinsic fraud in *Throckmorton* proved to be blurry and difficult to apply in practice. These difficulties became strikingly evident thirteen years after *Throckmorton* in *Marshall v. Holmes*.⁴⁴

In *Marshall*, Sarah Marshall, a plaintiff in an independent action sought to enjoin the enforcement of multiple state court judgments taken against her.⁴⁵ The judgments, according to Marshall, were the product of fraud.⁴⁶ In particular, Marshall alleged that the plaintiff in the underlying lawsuit against her used evidence of a forged letter to obtain the judgments.⁴⁷ Sometime after the suit was filed in Louisiana state court, Marshall sought to remove the case to federal court on diversity grounds.⁴⁸ The state court refused the application for removal, and Marshall lost on the merits of her suit.⁴⁹

The Supreme Court, in an opinion written by Justice Harlan, reversed the decision of the lower court, on the ground that removal was proper, and vacated all of the orders of the state court after Marshall filed the failed petition for removal.⁵⁰ The Court's opinion also included, however, significant dicta related to the merits of the fraud claim.⁵¹ The Court observed the "settled doctrine" that a party may obtain relief from a judgment where fraud prevents a fact from being a part of the original litigation when the fact "clearly proves it to be against conscience to execute a judgment."⁵² Interestingly, the Court cited *Throckmorton* in support of this seemingly broad judgment relief language.⁵³ Relying on the *Marshall* dicta together with the case's facts—evidence of a forged letter—some courts held that the distinction between intrinsic and extrinsic fraud was eliminated.⁵⁴ While this reading of *Marshall* ignores the actual

43. *Id.*

44. *See Marshall v. Holmes*, 141 U.S. 589, 596–97 (1891).

45. *Id.* at 589.

46. *Id.*

47. *Id.*

48. *Id.* at 590.

49. *Id.*

50. *See id.* at 601.

51. *See id.* at 596.

52. *Id.*

53. *See id.*

54. The Supreme Court had the opportunity to address the distinction between intrinsic and extrinsic fraud several times after it decided *Throckmorton*. *See, e.g., Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 421 (1923). But the Court has consistently punted the issue. For instance, in *Toledo Scale Co.*, a party sought an injunction against the enforcement of a patent judgment on the basis that the other party fraudulently concealed evidence during the original proceeding. *Id.* at 423–24. Justice Taft, writing for the Court, avoided deciding whether the distinction was viable, writing "[w]e do not find ourselves obliged to enter upon a consideration of the sometimes nice distinctions made between intrinsic and extrinsic frauds in the application of the rule." *Id.* at 421. Taft was able to avoid making a decision on the issue by resolving the case on other equitable considerations, holding that "to justify setting aside a decree for fraud whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making

holding of the case (limited to the jurisdictional question) and the nuance of the opinion's remaining language, the reading is likely motivated by the problems inherent in the intrinsic/extrinsic fraud distinction. Why, for instance, should conclusive evidence of perjury not override judgment finality?⁵⁵ Are we comfortable as a society that some of the decrees of our final arbiters are, at their essence, untrue? As a result of the confusion stemming from the *Throckmorton* and *Marshall* opinions, courts across the country continue to grapple with these questions. And while the Supreme Court had the opportunity to eliminate the problematic distinction when it promulgated the Rules of Civil Procedure, it chose to allow it to persist.⁵⁶

2. *The Inherent Power to Vacate Judgments for Fraud on the Court*

Another avenue that litigants would often traverse to seek post-term relief was the court's inherent power to modify or vacate its own judgments after the term expired.⁵⁷ Courts created this power as a relief valve to provide justice and truth in judgments where the court-created term rule would have ordinarily restricted their ability to do so.⁵⁸ While courts recognized the need to invoke their post-term authority over otherwise final judgments in certain circumstances, the power was, as a practical matter, narrowly focused and did not provide relief in many cases.⁵⁹ But a trial court's inherent power over its own judgments did allow it to modify or vacate decrees that provided prospective, continuing injunctive relief,⁶⁰ to set aside void judgments,⁶¹ or to vacate judgments procured by a fraud upon the court.⁶²

The United States Supreme Court recognized a court's post-term power to vacate judgments procured by a fraud upon the court in *Hazel-*

a full and fair defense." *Id.* In *Toledo Scale Co.*, according to the Court, the aggrieved party did not prove that the concealed evidence prevented it from making a full and fair defense. *See id.* at 424.

55. As discussed in Part V, *infra*, proponents of the distinction have long argued that there is a risk that too many losing litigants will attempt to prove that they are the victims of perjury (or even claim that they can conclusively establish perjury) in order to perpetuate litigation even when their claims are not meritorious. While this argument might have carried more weight in the notice pleading era, new heightened pleading standards in the federal courts minimize the chance that an unsupportable allegation of perjury, even an allegation that a party can conclusively establish perjury, will survive a motion to dismiss. *See* FED. R. CIV. P. 9(b). And even if some unsupportable perjury allegations gain a party access to discovery, the court has other methods to ferret out the unfounded claim and punish the party needlessly perpetuating the dispute. *See* FED. R. CIV. P. 11(c).

56. *See infra*, Part II.B.

57. *See* *Bucy v. Nev. Constr. Co.*, 125 F.2d 213, 216-17 (9th Cir. 1942); *see also* James Wm. Moore & Elizabeth B. A. Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 627 (1946).

58. *See* Moore & Rogers, *supra* note 57, at 629.

59. *See id.* at 627 (noting the "occasional" use of the courts' inherent powers and the inflexibility of the term rule in allowing courts to provide relief).

60. *See* *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

61. *See* *United States v. Sotis*, 131 F.2d 783, 787 (7th Cir. 1942).

62. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944), *overruled on other grounds by* *Standard Oil of Cal. v. United States*, 429 U.S. 17 (1976).

*Atlas Glass Co. v. Hartford-Empire Co.*⁶³ In *Hazel-Atlas*, the Court was confronted with egregious litigation fraud but found itself handcuffed by the intrinsic fraud bar.⁶⁴ Stuck between the intrinsic fraud bar and unsavory facts that called out for relief, the Court turned to the fraud on the court doctrine.⁶⁵ Historically, the fraud on the court doctrine was used to relieve a party from a judgment procured through fraud by a judicial officer, like a judge, but the pressure the Court found itself under in *Hazel-Atlas* led to a holding that expanded the concept to fraud by attorneys, as officers of the court.⁶⁶ In the underlying litigation, Hartford-Empire Co. (Hartford) sought a patent from the United States Patent Office (Patent Office) for a machine that helped make glass bottles.⁶⁷ The Patent Office was largely hostile to Hartford's patent application, leaving Hartford looking for a way to convince the Patent Office to grant the patent.⁶⁸ Hartford ultimately concocted a scheme to gain credence for its patent application.⁶⁹ As part of this scheme, both Hartford officials and Hartford attorneys drafted a phony article for a glass trade publication.⁷⁰ The article conveniently observed that the machine was "a remarkable advance in the art of fashioning glass by machine."⁷¹ They then convinced a prominent glass bottling expert to sign the article, creating the impression that the expert authored it.⁷² Faced with new evidence that the machine was indeed "remarkable," putatively authored by a prominent glass bottling expert, the Patent Office granted the application in 1928.⁷³

With its patent still hot off the government's presses, Hartford filed suit against Hazel-Atlas Glass Company (Hazel) for patent infringement.⁷⁴ The district court dismissed the action because it found no evidence of infringement.⁷⁵ Hartford appealed the unfavorable decision and proffered the bogus article as a ground for reversal.⁷⁶ The circuit court bought Hartford's argument and reversed the district court's decision, "[q]uoting copiously from the article" to find that Hazel infringed on Hartford's patent.⁷⁷

At the time of the original action, Hazel heard that Hartford's lawyer was the true author of the article.⁷⁸ But Hazel decided to rely on other defenses to the suit in the trial court.⁷⁹ After losing in the court of ap-

63. *Id.*

64. *See id.* at 244–46.

65. *See id.* at 248–50.

66. *See id.* at 250–51.

67. *Id.* at 240.

68. *Id.*

69. *See id.*

70. *See id.*

71. *Id.*

72. *See id.*

73. *See id.* at 240–41.

74. *See id.* at 241.

75. *Id.*

76. *Id.*

77. *Id.* at 241–42.

78. *Id.* at 241.

79. *See id.*

peals, Hazel attempted to verify the truth of the allegations about the article, but Hazel was unable to do so even after hiring an investigator.⁸⁰ As a result, Hazel ultimately resorted to paying Hartford \$1,000,000.⁸¹ Then, in an unrelated 1941 trial involving Hartford and another party, expense account documents, accounting records, and other files came to light that proved Hartford's lawyers and company officials, *not* the putative expert author, drafted the phony article.⁸² Shortly after this discovery, Hazel filed a petition to seek relief from the original 1932 judgment in the circuit court.⁸³ The circuit court denied relief, and Hazel petitioned the United States Supreme Court.⁸⁴

Justice Black, writing for the Court, observed the "general rule" that courts lose the power to vacate their judgments at the expiration of the term in which the judgment was signed.⁸⁵ But "where enforcement of the judgment is 'manifestly unconscionable,'" a court has the equitable power to grant relief—even after the term has expired.⁸⁶ Although the judgment from which Hazel sought relief was nine years old (well outside the term that the court rendered it in), the Court granted Hazel relief.⁸⁷ The judgment, according to Black, was not based on merely the "possibly" perjured testimony of a witness.⁸⁸ Instead, the *undisputed* facts showed that Hartford was guilty of a deliberate, calculated scheme to "defraud . . . the Circuit Court of Appeals."⁸⁹ This scheme was sufficient to justify relief despite the fact that Hazel may not have been diligent in pursuing the truth about the bogus article.⁹⁰ The Court was willing to ignore a potential lack of diligence because the fraud did "not concern only private parties," but rather, was an affront to the administration of justice and the proper function of the judicial system because the fraud was perpetrated on the court through the corruption of one of its own officers, an attorney.⁹¹ Thus, fraud on the court is properly limited to situations where a judge or other court officer participates in the fraud.⁹²

80. *Id.* at 241-43.

81. *See id.*

82. *Id.* at 243.

83. *Id.*

84. *Id.* at 244.

85. *Id.* at 244-45.

86. *Id.*

87. *See id.* at 244-51.

88. *Id.* at 245.

89. *Id.*

90. *Id.* at 245-46 (noting that Hazel did all that it should have been expected to do in any event).

91. *Id.* at 246. Beyond undermining the judicial system, the Court noted that the fraud was in a matter that was particularly important to the public—a patent suit. *Id.* While patent suits are undoubtedly important to the public, so are many other matters before district courts across the country. Thus, the strongest rationale for the Court's exercise of inherent power is likely that the fraud was perpetrated directly on the court by one of its own officers. *See id.* at 241-42.

92. Most commentators agree that fraud on the court is a ground for relief where the claim involves, among other things, the corruption of a judicial officer and injury to more than a single litigant. Compare MOORE's, *supra* note 7, at § 60.81[1][b][v], with WRIGHT, MILLER & KANE, *supra* note 24, at § 2870. And an independent action is a *remedy* through

Including attorneys in this category is likely a good idea, but it would not have been necessary if the aggrieved party could have obtained relief through an independent action because of perjured testimony in the original action.

B. THE SUPREME COURT ATTEMPTS TO CONSOLIDATE RELIEF FROM JUDGMENTS UNDER ORIGINAL RULE 60(b)

In 1937, the Supreme Court substantially revised the procedures for seeking relief from fraudulent judgments when it promulgated Federal Rule of Civil Procedure 60.⁹³ Subpart (a) of Original Rule 60 allowed courts to correct clerical errors in their judgments.⁹⁴ Subpart (b), on the other hand, allowed district courts to provide substantive relief from judgments where granting relief required more than the correction of a clerical error.⁹⁵ Original Rule 60(b) read:

(b) Mistake; Inadvertence; Surprise; Excusable Neglect. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U.S.C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.⁹⁶

Original Rule 60(b) provided a simplified motion practice to obtain relief based on the grounds enumerated in the Rule when compared to the ancient remedies that preceded the Rule.⁹⁷ But disappointingly, the Rule did not appear to allow a court to grant relief from a judgment procured by fraud or in light of newly discovered evidence.⁹⁸ This problem

which fraud or fraud on the court claims may be brought. *See id.* Substantial confusion remains, however, in courts where the independent action is often confused with a fraud on the court claim and vice-versa. *See id.*; *see also, e.g.,* M. W. Zack Metal Co. v. Int'l Navigation Corp. of Monrovia, 675 F.2d 525, 529-30 (2d Cir. 1982).

93. FED. R. CIV. P. 60 (1936) (superseded 1946), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 10[1]; *see also* Note, *Attacking Fraudulently Obtained Judgments In The Federal Courts*, 48 IOWA L. REV. 398, 399 (1963) ("Federal Rule of Civil Procedure 60(b) is a codification of one practice in respect to the correction of judgments after the time period for appeal has expired.").

94. *See* MOORE's, *supra* note 7, at § 60 App. 10[1].

95. *Id.*; *see also* Moore & Rogers, *supra* note 57, at 631-32.

96. MOORE's, *supra* note 7, at § 60 App. 10[1].

97. *Id.*; *see also* Charles William Patrick, Jr., Note, *Relief from Unfairly Obtained Verdicts in Federal Court: Determination and Analysis of the Level of Fraud Required for Vacation of Judgments Under FED. R. CIV. P. 60(b)*, 30 S.C. L. REV. 781, 787-88 (1979).

98. *See* FED. R. CIV. P. 60(b) advisory committee's note (1937), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 10[2] ("This section is based upon Calif. Code Civ. Proc. . . . § 473.").

stemmed, in large part, from the textual ancestor of Original Rule 60(b).⁹⁹ The Rules Advisory Committee that drafted Original Rule 60(b) based the Rule on the conservatively drafted section 473 of the California Code of Civil Procedure.¹⁰⁰ In particular, the first two sentences of Rule 60(b) were taken, nearly verbatim, from the California Code.¹⁰¹ The first sentence, by its express terms, narrowly provided relief for mistake, inadvertence, surprise, or excusable neglect.¹⁰² But the Rule was silent with respect to judgments procured by fraud and newly discovered evidence.¹⁰³ This narrow drafting did not, however, stop courts from upsetting judgments obtained by fraud for exactly these reasons.¹⁰⁴ Courts found three footholds to broaden the Rule from its facially narrow text.

First, the narrow drafting of the first sentence (limited to mistake, inadvertence, surprise, or excusable neglect) of the Rule gave way to a more liberal construction that included the ability to grant relief from judgments procured by fraud, based largely on California state decisions liberally interpreting corresponding section 473 of the California Code.¹⁰⁵ Thus, despite the absence of a specific reference to "fraud" in Original Rule 60(b), courts interpreted the provision to allow this specific relief.¹⁰⁶

Second, Rule 60(b) contained two savings clauses that section 473 did not.¹⁰⁷ Most significantly, according to the first savings clause, the terms of the Rule did "not limit the power of a court . . . to entertain an action

99. *See id.*

100. Basing Rule 60(b) largely on section 473 of the California Code appears to have come after several drafts of Rule 60(b) were circulated at the suggestion of a member of the original Rules Advisory Committee from California. *See* MOORE's, *supra* note 7, at § 60 App. 102[4]. This is particularly unfortunate because previous drafts of the rule did not slavishly track the California Code and allowed, by their terms, more comprehensive relief. *See* April 1937 Draft of Rule 57 (ultimately Rule 60(b)), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 102[3] (allowing relief for fraud upon proper motion); May 1936 Preliminary Draft of Rule 66 (ultimately Rule 60(b)), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 102[2] (allowing relief for fraud and newly discovered evidence upon proper motion).

101. *Compare* CAL. CIV. PRO. CODE § 473 (Deering 1937), *with* FED. R. CIV. P. 60(b) (1936) (superseded 1946), *both reprinted in* MOORE's, *supra* note 7, at §§ 60 App. 10[1], 102[5].

102. FED. R. CIV. P. 60(b) (1937) (superseded 1946), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 10[1].

103. *Id.*

104. *See* *Fiske v. Buder*, 125 F.2d 841, 845 (8th Cir. 1942); *Preveden v. Hahn*, 36 F. Supp. 952, 953-54 (S.D.N.Y. 1941); *San Joaquin & Kings River Canal & Irrigation Co. v. James J. Stevenson*, 166 P. 338, 339-41 (Cal. 1917); *Bacon v. Bacon*, 89 P. 317, 321 (Cal. 1907); *see also* Moore & Rogers, *supra* note 57, at 633-34 (noting that California decisions are persuasive in the interpretation of Original Rule 60(b)'s first two sentences).

105. *See Fiske*, 125 F.2d at 845; *Bacon*, 89 P. at 321; *see also* Moore & Rogers, *supra* note 57, at 633-34.

106. *See Fiske*, 125 F.2d at 845; *Bacon*, 89 P. at 321; *see also* Moore & Rogers, *supra* note 57, at 633-34.

107. *Compare* CAL. CIV. PRO. CODE § 473 (Deering 1937), *with* FED. R. CIV. P. 60(b) (1937) (superseded 1946), *both reprinted in* MOORE's, *supra* note 7, at §§ 60 App. 10[1], 102[5].

to relieve a party from a judgment, order, or proceeding.”¹⁰⁸ While the drafters most likely intended this savings clause to preserve the right of the party to bring an independent action in equity, courts interpreted the savings clause liberally to also include the ancient legal remedies (*coram nobis* and *audita querela*) and the equitable remedies (bill of review and bill in the nature of review) that allowed a court to review its judgments after the term in which the court had rendered them expired.¹⁰⁹ Thus, despite narrow drafting, the spectrum of judgment review available to courts under Original Rule 60(b) was similar to previous practice.¹¹⁰

Third, after the adoption of Original Rule 60(b), courts continued to recognize their inherent power to vacate judgments for fraud upon the court.¹¹¹ Courts continued to vacate judgments for fraud committed by a judicial officer (fraud on the court) or judgments that had been satisfied or were void.¹¹² These powers, being inherent, were not abrogated by the Rule.¹¹³ Thus, the courts continued to review judgments well outside of the time period prescribed by the Rules so long as the reason for review fell within the courts’ inherent powers.¹¹⁴

In addition to creating a simplified, albeit facially narrow, motion procedure to obtain relief from judgments, Original Rule 60(b), like its California counterpart, set a firm time limit for seeking relief from judgments by motion (as opposed to an independent action or fraud on the court).¹¹⁵ Pursuant to this limitation, a party had to move for relief within a “reasonable time,” not to exceed six months after the judgment was “taken.”¹¹⁶ This two-pronged approach—reasonableness accompanied by an outside, firm time limit for motions—persists in the modern Rule and provides a specific time period tempered by objective reasonableness, by which a party should file motions for relief from judgments.¹¹⁷ By linking the deadline for seeking relief from the judgment to the time a court entered a judgment, the Rule avoided the unfairness that could result from the previous term-based deadline. For instance, under the term rule, a party seeking relief from a judgment that a court rendered at or near the end of the term would have a very short time period to seek

108. Original Rule 60(b) also contained a second savings clause that allowed district courts to set aside judgments obtained against a defendant who was not personally notified. *See id.*

109. *See* *Wallace v. United States*, 142 F.2d 240, 244 (2d Cir. 1944); *Fraser v. Doing*, 130 F.2d 617, 620 (D.C. Cir. 1942); *Preveden*, 36 F. Supp. at 953; *see also* *Moore & Rogers*, *supra* note 57, at 633–35.

110. *See supra* note 97 and accompanying text.

111. *See, e.g., Fiske*, 125 F.2d at 849; *Preveden*, 36 F. Supp. at 953–54.

112. *See, e.g., Tri-Cran, Inc. v. Fallon (In re Tri-Cran, Inc.)*, 98 B.R. 609, 624 (Bankr. D. Mass. 1989).

113. *Bucy v. Nev. Constr. Co.*, 125 F.2d 213, 216–17 (9th Cir. 1942).

114. *See, e.g., Dausel v. Dausel*, 195 F.2d 774, 775 (D.C. Cir. 1952).

115. FED. R. CIV. P. 60(b) (1937) (superseded 1946), *reprinted in* MOORE’S, *supra* note 7, at § 60 App. 10[1].

116. *See id.*

117. *Compare id., with* FED. R. CIV. P. 60(c).

relief.¹¹⁸ But a party seeking relief from a judgment rendered at the beginning of a term would have a much longer time period to seek relief.¹¹⁹ By fixing the deadline to seek relief from a judgment to each particular judgment, the Rule provided an equal amount of time to seek relief from each judgment.¹²⁰

Despite the improvements in post-judgment practice under the Rule, criticism of the Rule took account of its notable deficiencies.¹²¹ In particular, the Federal Rules of Civil Procedure were supposed to simplify practice.¹²² Instead, the liberally construed savings clause of Original Rule 60(b) allowed complex ancient procedures to persist.¹²³ According to commentators, the Rule would be more effective if it abolished "both the substance and procedure" of the old equitable and common law ancillary remedies but left the independent action in place.¹²⁴ Doing so would be workable, however, only if the Rule was amended to include fraud and newly discovered evidence as bases for relief by motion within a specified time period.¹²⁵ Moreover, some viewed the six-month time limit as too short and proposed extending it.¹²⁶ By 1946, the Rules Advisory Committee considered these changes, among others, and recreated Rule 60(b) in its modern incarnation.¹²⁷

C. MODERN RULE 60(b) CONSOLIDATES AND STREAMLINES JUDGMENT RELIEF PRACTICE

After several draft proposals to amend Rule 60(b), the advisory committee amended the Rule on December 27, 1946.¹²⁸ Before it was restyled, the revised Rule read:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final

118. See FED. R. CIV. P. 60(b) (1937) (superseded 1946), *reprinted in* MOORE'S, *supra* note 7, at § 60 App. 10[1]; *see also* Moore & Rogers, *supra* note 57, at 628–29.

119. See *supra* note 118 and accompanying text.

120. See FED. R. CIV. P. 60(b) (1937) (superseded 1946), *reprinted in* MOORE'S, *supra* note 7, at § 60 App. 10[1]; *see also* Moore & Rogers, *supra* note 57, at 628–29.

121. See FED. R. CIV. P. 60(b) advisory committee's note (1946) (citing *Wallace v. United States*, 142 F.2d 240, 240 (2d Cir. 1944)), *reprinted in* MOORE'S, *supra* note 7, at § 60 App. 11[2]; *see also* Moore & Rogers, *supra* note 57, at 685–93.

122. See FED. R. CIV. P. 60(b) advisory committee's note (1946), *reprinted in* MOORE'S, *supra* note 7, at § 60 app. 11[2]; Moore & Rogers, *supra* note 57, at 685–86.

123. See *supra* note 122 and accompanying text.

124. See Moore & Rogers, *supra* note 57, at 692.

125. See FED. R. CIV. P. 60(b) advisory committee's note (1946), *reprinted in* MOORE'S, *supra* note 7, at § 60 App. 11[2].

126. See Moore & Rogers, *supra* note 57, at 691–92.

127. FED. R. CIV. P. 60(b) advisory committee's note (1946), *reprinted in* MOORE'S, *supra* note 7, at § 60 App. 11[2]. While the substance of Rule 60(b) has remained essentially the same since the adoption of the 1946 amendments, the style of the Rule was altered in the 2007 restyling of the Federal Rules. The restyling is discussed in more detail in Part I.C., *infra*.

128. FED. R. CIV. P. 60(b) (1946) (superseded 2007), *reprinted in* MOORE'S, *supra* note 7, at § 60 App. 11[1].

judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, USC, Title 28, § 118, or to set aside a judgment for fraud upon the court. Writs coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be made by motion as prescribed in these rules or by an independent action.¹²⁹

The 1946 amendments to Rule 60(b) resolved several problems in Original Rule 60(b).¹³⁰ These changes recognized that Original Rule 60(b) functioned fairly well, but it did not simplify and unify the procedures for obtaining relief from a final judgment.¹³¹ To accomplish this, the committee made several key changes that unified and broadened rule-based judgment relief practice.¹³² First, Rule 60(b) was amended to expressly include the full spectrum of substantive relief that was available in federal courts before the adoption of Original Rule 60(b).¹³³ Second, the Rule was amended to expressly include both intrinsic and extrinsic fraud as a basis for relief by motion.¹³⁴ Third, the drafters changed the Rule to allow relief by motion for newly discovered evidence that could not, with reasonable diligence, have been discovered before the running of the time to file a motion for new trial.¹³⁵ Fourth, the six-month time

129. *Id.*

130. *See id.*

131. *See* FED. R. CIV. P. 60(b) advisory committee's note (1946), *reprinted in* MOORE'S, *supra* note 7, at § 60 App. 11[2] ("It is obvious that the rules should be complete [as a rule of procedure governing relief from judgments] and define practice with respect to any existing rights or remedies to obtain relief from final judgments.").

132. *See* FED. R. CIV. P. 60(b) (1946) (superseded 2007), *reprinted in* MOORE'S, *supra* note 7, at § 60 App. 11[1].

133. *See id.*

134. *Id.* 60(b)(3); *see also* FED. R. CIV. P. 60(b) advisory committee's note (1946), *reprinted in* MOORE'S, *supra* note 7, § 60 App. 11[2].

135. FED. R. CIV. P. 60(b)(2) (1946) (superseded 2007), *reprinted in* MOORE'S, *supra* note 7, at § 60 App. 11[1]; *see also* FED. R. CIV. P. 60(b) advisory committee's note (1946).

limit to file motions for mistake, etc. was extended to one year and expanded to cover motions based on fraud (extrinsic or intrinsic) or newly discovered evidence.¹³⁶ Fifth, the drafters added subsections four and five to allow relief on the basis that a judgment was void or should not have prospective application because it had been discharged or satisfied (or that it was no longer equitable to enforce the judgment),¹³⁷ and they added subsection six, which allows a court to grant relief for “any other reason.”¹³⁸ Sixth, in light of the large expansion of grounds for relief embodied in subsections two through six, the Rule abolished the old common law writs and equitable remedies available before adoption of the Rule.¹³⁹ This had the effect of unifying all judgment relief practices under Rule 60. Finally, the drafters clarified the savings clause to provide for relief based on an independent action and not the other old writs and equitable remedies, and they also added fraud on the court as a basis for seeking relief.¹⁴⁰ These changes had the effect of allowing relief from judgments procured by both extrinsic and intrinsic fraud if the relief was sought within one year. But outside of one year, relief from fraud was available only by independent action, and the Rule did not abolish the distinction between intrinsic and extrinsic fraud for independent actions.¹⁴¹ Thus, outside of one year, relief from judgments procured by fraud was available only where the fraud was extrinsic.

Without changing the substance of the Rules, the Rules Advisory Committee “restyled” the Federal Rules of Civil Procedure, including Rule 60(b), in 2007.¹⁴² The changes to Rule 60(b) were a “part of the general restyling of the Civil Rules to make them more easily understood . . . [The] changes are intended to be stylistic only.”¹⁴³ Thus, the substance of the Rule remains largely unchanged from the 1946 amendments.¹⁴⁴ But the Rule did get a facelift, primarily consisting of new section headings and a new section-based organization.¹⁴⁵ In addition, the restyling deleted the last clause of the final sentence of Amended Rule 60(b) (“and

136. FED. R. CIV. P. 60(b) (1946); *see also* FED. R. CIV. P. 60(b) advisory committee's note (1946), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 11[2].

137. FED. R. CIV. P. 60(b)(4)–(5) (1946) (superseded 2007), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 11[1]; *see also* FED. R. CIV. P. 60(b) advisory committee's note (1946), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 11[2].

138. *See* FED. R. CIV. P. 60(b) (1946) (superseded 2007), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 11[1].

139. *Id.* 60(b); *see also* FED. R. CIV. P. 60(b) advisory committee's note (1946), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 11[2].

140. FED. R. CIV. P. 60(b) (1946) (superseded 2007), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 11[1]; *see also* FED. R. CIV. P. 60(b) advisory committee's note (1946), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 11[2].

141. FED. R. CIV. P. 60(b) (1946) (superseded 2007), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 11[1]; *see also* FED. R. CIV. P. 60(b) advisory committee's note (1946), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 11[2].

142. FED. R. CIV. P. 60(b) (2007); *see also* FED. R. CIV. P. 60(b) advisory committee's note (2007).

143. FED. R. CIV. P. 60(b) advisory committee's note (2007).

144. *Compare* FED. R. CIV. P. 60(b) (1946) (superseded 2007), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 11[1], *with* FED. R. CIV. P. 60(b) (2007).

145. *See* FED. R. CIV. P. 60(b)–(e) (2007).

the procedure for obtaining any relief from a judgment shall be made by motion as prescribed in these rules or by an independent action”)¹⁴⁶ as “unnecessary,” but the advisory committee’s note specifically points out that this deletion did not change the spectrum of relief available under Rule 60.¹⁴⁷ Restyled Rule 60(b) now reads:

- (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
 - (1) mistake, inadvertence, surprise, or excusable neglect;
 - (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
 - (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
 - (4) the judgment is void;
 - (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
 - (6) any other reason that justifies relief.
- (c) Timing and Effect of the Motion.
 - (1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
 - (2) Effect on Finality. The motion does not affect the judgment’s finality or suspend its operation.
- (d) Other Powers to Grant Relief. This rule does not limit a court’s power to:
 - (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
 - (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or
 - (3) set aside a judgment for fraud on the court.
- (e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.¹⁴⁸

The drafters did an excellent job of organizing a once-cluttered rule into easily discernable subsections. In the spirit of this trend toward clarity, and in the spirit of consistency, this Article will refer to modern, restyled Rule 60(b) simply as “Rule 60(b)” or the appropriate Rule 60 subsection as those subsections are currently drafted. For instance, relief by independent action is now available under Rule 60(d).¹⁴⁹ Accord-

146. See FED. R. CIV. P. 60(b) (1946) (superseded 2007), *reprinted in* MOORE’S, *supra* note 7, at § 60 App. 11[1].

147. FED. R. CIV. P. 60(b) advisory committee’s note (2007).

148. FED. R. CIV. P. 60(b)–(e) (2007).

149. FED. R. CIV. P. 60(d) (2007).

ingly, the discussion related to independent actions will reference the modern subsection.

III. RULE 60(d) INDEPENDENT ACTIONS PROVIDE JUDGMENT RELIEF FOR INTERPARTY FRAUD CLAIMS BROUGHT MORE THAN ONE YEAR AFTER THE ENTRY OF JUDGMENT

Rule 60(b) provides relief from judgments for a broader range of grounds than Original Rule 60(b), but a litigant seeking relief under subsections one through three (mistake, fraud, newly discovered evidence, etc.) of the provision must move within one year of the entry of judgment.¹⁵⁰ The one-year deadline for these motions represents an extension of the six-month limitation under Original Rule 60(b).¹⁵¹ While the one-year limitation applies to motions predicated on subsections one through three, a party must move for relief under subsections four through six (void judgment, satisfied judgment, or any other reason) within a "reasonable time."¹⁵² And while subsection six seems to provide for broad relief outside of one year, the provision has been construed to provide relief only for motions based on grounds other than those ("any other reason") expressly stated in subsections one through five.¹⁵³ In other words, subsection six does not provide relief for motions based on fraud, either intrinsic or extrinsic, outside of one year because those grounds are expressly stated in the Rule and expressly covered by the Rule's one-year time limitation.¹⁵⁴ Thus, while the extension of time to file motions based on mistake, fraud, and newly discovered evidence from six months to one year was a successful part of the overall effort to liberalize and unify judgment relief practice under Rule 60(b),¹⁵⁵ it acts as an unjust bar to relief for those who discover fraud or new evidence one year and one day after the entry of judgment (and beyond).¹⁵⁶ As explained below, however, the Rule does preserve other mechanisms for

150. FED. R. CIV. P. 60(b), (c)(1) (2007); *see also* FED. R. CIV. P. 60(b) advisory committee's note (1946).

151. *Compare* FED. R. CIV. P. 60(b) (1946), *with* FED. R. CIV. P. 60(b), (c) (2007).

152. *See* FED. R. CIV. P. 60(c)(1) (2007).

153. *See* Klapprott v. United States, 335 U.S. 601, 613-16 (1949) (relieving party from default judgment under 60(b)(6) where defaulting party was imprisoned when the default was taken, noting that the circumstances were "extraordinary"); *see also* Mary Kay Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41, 52-54 (1979).

154. *See supra* note 134 and accompanying text; *see also* Ackermann v. United States, 340 U.S. 193, 202 (1950) (refusing to relieve a party from judgment where grounds of a 60(b)(6) motion were appropriate under 60(b)(1), which is governed by a one year limitation).

155. *See* FED. R. CIV. P. 60(b) advisory committee's note (1946), *reprinted in* MOORE'S, *supra* note 7, at § 60 App. 11[2]; *see also* Moore & Rogers, *supra* note 57, at 686-87, 691 (noting that the six month time period under Original Rule 60(b) was "probably too short" and proposing an extension to one year).

156. *See* FED. R. CIV. P. 60(b), (c)(1) (2007); *see also* Robert D. Sharp, *Relief from Fraudulent Judgments in the Federal Courts: Motion to Vacate or Independent Action—Opposite Sides of the Same Coin*, 36 DRAKE L. REV. 389, 392, 407-08 (1987).

seeking relief after one year has elapsed, most notably the independent action in equity.¹⁵⁷ These procedures impose significant hurdles upon the litigant seeking relief from a fraudulently procured judgment, including, in some circuits, a bar on judgment relief claims based on intrinsic fraud.¹⁵⁸

A. THE CIRCUITS ARE SPLIT ON WHETHER JUDGMENT RELIEF
IS AVAILABLE FOR INTRINSIC FRAUD CLAIMS
BROUGHT OUTSIDE OF ONE YEAR

Rule 60(b)(3) expressly dispenses with the distinction between extrinsic and intrinsic fraud for claims brought under Rule 60(b) within one year from the entry of judgment.¹⁵⁹ But in several circuits, the distinction, described as “shadowy, uncertain, and somewhat arbitrary,”¹⁶⁰ has survived for fraud claims brought in a Rule 60(d) independent action.¹⁶¹ Indeed, the subtle confusion created by *Marshall* has been amplified by the decisions of lower courts that refuse to recognize the distinction between extrinsic and intrinsic fraud.¹⁶² And while most courts bar judgment relief claims for intrinsic fraud brought outside of one year, one notable Third Circuit case refused to limit relief only to cases of extrinsic fraud.¹⁶³ In *Publicker v. Shallcross*, a debtor compromised a claim of \$850,000 for one cent on the dollar by falsely representing that his assets amounted to only \$8,500.¹⁶⁴ In reality, his assets totaled more than \$230,000 at the time he settled the claim.¹⁶⁵ Two years after the judg-

157. See FED. R. CIV. P. 60(d) (2007).

158. See *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 79 (5th Cir. 1970) (citing *Nat'l Sur. Co. v. State Bank of Humboldt*, Humboldt, Neb., 120 F. 593, 598 (8th Cir. 1903)) (explaining that in addition to fraud, a party seeking relief by equitable action must prove additional, equitable requirements).

159. See FED. R. CIV. P. 60(b)(3) (2007).

160. *Howard v. Scott*, 125 S.W. 1158, 1166 (Mo. 1910); see also Diane E. Evans, *Seeking More Equitable Relief from Fraudulent Judgments: Abolishing the Extrinsic-Intrinsic Distinction*, 12 PAC. L.J. 1013, 1022–25 (1981) (noting inconsistencies in application of the distinction in various contexts).

161. Rule 60(d) also recognizes the Court's inherent authority to vacate a judgment for fraud on the court. FED. R. CIV. P. 60(d)(3) (2007). The focus of this Article, however, is interparty fraud. Although commentators have noted that some confuse extrinsic interparty fraud with fraud on the court, see, e.g., Sharp, *supra* note 156, at 404–05, Rule 60(d) probably intended “fraud on the court” to reference a ground for relief (as opposed to the independent action remedy). As a ground, fraud on the court is separate and apart from the interparty fraud that may also be brought in an independent action. See *id.*; see also MOORE'S, *supra* note 7, at § 60.81[1][b][v]; Clark, *supra* note 22, at 554–55.

162. See *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016, 1022–23 (3d Cir. 1987) (“[T]he ‘extrinsic’-‘intrinsic’ distinction which is based on a statement in *United States v. Throckmorton* . . . was overruled, if it was ever the law, by *Marshall v. Holmes*.”) (citations omitted); see also *Gleason v. Jandrucko*, 860 F.2d 556, 558, 560 (2d Cir. 1988) (noting in dicta that “relief from a judgment by way of an independent action need not be premised on a showing of extrinsic as opposed to intrinsic fraud,” but also recognizing that “the type of fraud necessary to sustain an independent action attacking the finality of a judgment is narrower in scope than that which is sufficient for relief by timely motion”).

163. *Publicker v. Shallcross*, 106 F.2d 949, 950–52 (3d Cir. 1939).

164. *Id.* at 949.

165. *Id.*

ment, the receiver in the original action sought to vacate the judgment by an independent action in equity.¹⁶⁶ The district court refused to enjoin enforcement of the judgment, but the Third Circuit disagreed.

Noting that two lines of conflicting cases had emerged from the Supreme Court's decisions in *Throckmorton* and *Marshall*, the court held that the extrinsic fraud requirement announced in *Throckmorton* should be "modified in accordance with the more salutary doctrine of *Marshall v. Holmes*."¹⁶⁷ Accordingly, the Third Circuit reversed the district court and granted relief to the receiver on the grounds that the original compromise was procured through perjured testimony, holding that, "[w]e believe truth is more important than the trouble it takes to get it."¹⁶⁸

Most courts, however, continue to recognize the distinction between intrinsic and extrinsic fraud.¹⁶⁹ And these courts observe *Throckmorton*'s original maxim in combination with the time limitations of Rule 60(c)(1), holding that only proof of extrinsic fraud is sufficient to relieve a party from the effects of a judgment that is more than one year old.¹⁷⁰ In many cases, courts cite perjury as the classic example of intrinsic fraud and refuse to grant relief, consistent with the prevailing reading of *Throckmorton*.¹⁷¹ Other courts have denied relief for discovery abuse and misconduct.¹⁷² But even among the courts that continue to press the limitation on independent actions premised on intrinsic fraud, there is a recognition that the distinction is troubled.¹⁷³ For example, in a case involving perjury, the Fourth Circuit noted "the considerable criticism leveled against the intrinsic/extrinsic distinction and the debate regarding the effect of [*Marshall v. Holmes*],"¹⁷⁴ but the court went on to hold that relief would not lie for intrinsic fraud.¹⁷⁵ Thus, after nearly a century of criticism, the distinction continues to vex courts and commentators.¹⁷⁶

166. *See id.*

167. *Id.* at 952.

168. *Id.*

169. *See, e.g.,* Computer Leasco, Inc. v. NTP, Inc., 194 F. App'x 328, 336 (6th Cir. 2006); Fierro v. Johnson, 197 F.3d 147, 155 (5th Cir. 1999); 2300 Elm Hill Pike, Inc. v. Orlando Residence, Ltd., No. 97-6176, 1998 WL 808217, at *2 (6th Cir. Nov. 16, 1998); Lindo v. City & Cnty. of S.F., Dep't of Soc. Servs., No. 94-15335, 1994 U.S. App. LEXIS 30620, at *3-4 (9th Cir. Oct. 31, 1994); Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters, 675 F.2d 1349, 1358 (4th Cir. 1982); Wood v. McEwen, 644 F.2d 797, 801 (9th Cir. 1981); Hanna v. Britson Mfg. Co., 62 F.2d 139, 148 (8th Cir. 1932).

170. FED. R. CIV. P. 60(c)(1) (2007); *see also, e.g.,* 2300 Elm Hill Pike, Inc., 1998 WL 808217, at *2.

171. *See, e.g.,* George P. Reintjes Co., Inc. v. Riley Stoker Corp., 71 F.3d 44, 49 (1st Cir. 1995) (perjury not sufficient to support independent action); *Great Coastal Express, Inc.*, 675 F.2d at 1358 ("[I]t is clear that perjury and false testimony are not grounds for relief in an independent action.").

172. Kahn v. Gen. Motors Corp., No. 88 CIV 2982, 1998 WL 812053, at *2 (S.D.N.Y. Nov. 17, 1998), *aff'd*, 230 F.3d 1374 (Fed. Cir. 1999) (denying relief for "intrinsic" fraud (discovery abuse and perjury)).

173. *See Great Coastal Express, Inc.*, 675 F.2d at 1358.

174. *Id.*

175. *See id.*

176. While the focus of this Article is the *type* of fraud that is sufficient to entitle a judgment-relief plaintiff to relief, it is generally accepted that fraud must be proven by clear and convincing evidence to ultimately prevail on an attack on a judgment. *See, e.g.,*

B. TO OBTAIN RELIEF FROM A JUDGMENT THROUGH AN
INDEPENDENT ACTION, PARTIES MUST ESTABLISH
EQUITABLE REQUIREMENTS

Beyond proof of fraud as a ground for relief in an independent action, courts require separate proof of several prerequisites to equitable relief.¹⁷⁷ The independent action prerequisites are often stated as follows: (1) a judgment which ought not, in equity and good conscience, be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded;¹⁷⁸ (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of defendant; and (5) the absence of any remedy at law.¹⁷⁹

While this Article has dealt extensively with the requirement that a party establish the proper type of fraud, the other requirements are no less important.¹⁸⁰ For example, courts have routinely held that a party must establish that enforcement of a judgment would be “manifestly unconscionable” to obtain relief.¹⁸¹ In one modern case, *United States v.*

Gov’t Fin. Servs. One Ltd. P’ship v. Peyton Place, Inc., 62 F.3d 767, 772 (5th Cir. 1995). But the burden to obtain an evidentiary hearing on a fraud claim made in a Rule 60(b) motion, however, is murkier. *Compare* *Pearson v. First NH Mortg. Corp.*, 200 F.3d 30, 35 (1st Cir. 1999) (permitting evidentiary hearing when evidence of a “colorable” claim of fraud” exist), *with* *Jones v. Ill. Cent. R.R. Co.*, 617 F.3d 843, 854 (6th Cir. 2010) (holding that the district court did not abuse its discretion by denying evidentiary hearing because there was no “clear” or “compelling” evidence of fraud). Cases that require something akin to clear and convincing proof of fraud to obtain a hearing or discovery on a judgment fraud claim ignore the obvious paradox of such a requirement: a judgment-relief plaintiff seeking a hearing must have proof sufficient to satisfy the ultimate burden on the motion (clear and convincing proof) before being allowed to have a hearing to gather such evidence. In the Rule 60(b) motion context, this unduly high standard thwarts the purpose and clear meaning of Rule 60 and is inconsistent with the pleading rules that govern independent actions, creating a disparity between access to proof in motion cases and independent action cases. *See infra* Parts IV, V. Likewise, in the independent action context, requiring a judgment-relief plaintiff to produce clear and convincing evidence before allowing them to proceed to discovery is inconsistent with the plausibility pleading standards recently announced in *Twombly* and *Iqbal*. *See id.*

177. *See* MOORE’s, *supra* note 7, at § 60.82[2]–[4]; *see also*, *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 79 (5th Cir. 1970); *LinkCo, Inc. v. Akikusa*, 615 F. Supp. 2d 130, 139 (S.D.N.Y. 2009) (party must establish certain prerequisites to be entitled to equitable relief through the Rule 60(d)(1) independent action at equity); *Study v. United States*, No. 1:10-CV-0153-WTL-DHL, 2010 WL 1881947, at *2 (S.D. Ind. May 7, 2010) (same).

178. While the element of a good defense remains a part of most descriptions of the independent action elements, its significance in modern practice, outside of the default judgment context, is unclear. *See, e.g.*, MOORE’s, *supra* note 7, at § 60.82[1] (“[V]irtually no modern cases deal[] with the requirement.”). In any event, a party must, at the least, establish that the fraud prevented it from prevailing on the merits.

179. *See* *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985); *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 79 (5th Cir. 1970).

180. *Cf. LinkCo*, 615 F. Supp. 2d at 139 (party seeking relief from judgment procured by fraudulent inducement barred from relief because lack of diligence and unexcused delay preclude 60(d)(1) independent action relief).

181. *See* *United States v. Beggerly*, 524 U.S. 38, 46 (1998) (“[I]njustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of *res judicata*.”) (internal quotations omitted); *Pickford v. Talbott*, 225 U.S. 651, 658 (1912); *see also* MOORE’s, *supra* note 7, at § 60.82[4].

Beggerly, the Supreme Court refused to grant relief to a party that claimed the United States failed to produce relevant documents in the underlying action.¹⁸² If Rule 60(b) (which now includes 60(b)–(e)) “is to be interpreted as a coherent whole, [relief by independent action must] be reserved for those cases of ‘injustices which, in certain instances, are deemed sufficiently gross to demand a departure’ from rigid adherence to the doctrine of *res judicata*.”¹⁸³ Accordingly, a failure to produce relevant documents did not rise to a “grave miscarriage of justice”¹⁸⁴ sufficient to warrant relief. In contrast, the Court cited *Marshall* approvingly, in dicta, for the proposition that enforcing a judgment based on a forged document is a sufficiently grave miscarriage of justice to entitle a party to relief.¹⁸⁵ Thus, the alleged injustice that is the subject of the independent action must be egregious, manifestly unconscionable, or a grave miscarriage of justice to entitle a party to relief.¹⁸⁶

The plaintiff in an independent action must be free from fault and negligence.¹⁸⁷ Where parties are fully or partially to blame for the problem judgment, they may not seek relief through an independent action.¹⁸⁸ For example, when a party’s attorney fails to diligently investigate and pursue all available evidence at or before trial, that party will be barred from seeking relief if it discovers evidence after trial.¹⁸⁹ A party must exercise diligence to uncover frauds and misrepresentations at or before trial—not after trial.¹⁹⁰ Failure to exercise diligence in uncovering the underhanded actions of opposing counsel or parties will bar relief by independent action.¹⁹¹ Likewise, when a party or her attorney is negligent or fails to diligently pursue available legal remedies based on known problems with a judgment under Rule 60(b) (like a Rule 60(b)(3) motion based on fraud or mistake) within one year of judgment, the party cannot later complain through the Rule 60(d) independent action.¹⁹² Beyond fault and negligence, a party who seeks relief from a judgment by inde-

182. *Beggerly*, 524 U.S. at 46.

183. *Id.* (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)).

184. *Id.* at 47.

185. *Id.* *Beggerly* showcases the high burden placed on a litigant to obtain relief through an independent action, but some commentators still think the bar is not high enough. Indeed, at least one commentator proposes that current limitations are not sufficient and proposes more stringent restrictions on post-one-year relief from judgments. See Temple, *supra* note 16, at 979.

186. See *Beggerly*, 524 U.S. at 46; see also MOORE’S, *supra* note 7, at § 60.82[4].

187. See *Carteret Sav. & Loan Ass’n v. Jackson*, 812 F.2d 36, 40 (1st Cir. 1987) (independent action did not lie because of failure to establish lack of negligence in challenge to judgment enabling yacht sale); see also *LinkCo, Inc. v. Akikusa*, 615 F. Supp. 2d 130, 139 (S.D.N.Y. 2009) (failure to act diligently precludes independent action). See generally MOORE’S, *supra* note 7, at § 60.82[2].

188. See *Jackson*, 812 F.2d at 40.

189. See *Pickford v. Talbott*, 225 U.S. 651, 660 (1912).

190. See *id.*

191. See *id.* at 660; see also MOORE’S, *supra* note 7, at § 60.82[2].

192. See, e.g., *Jackson*, 812 F.2d at 39 (noting that an independent action “presupposes absence of fault or negligence”); see also MOORE’S, *supra* note 7, at § 60.82.

pendent action must have clean hands.¹⁹³

An independent action is appropriate only where there is no adequate remedy at law.¹⁹⁴ Within one year of judgment, a Rule 60(b)(1)–(6) motion allows relief on almost any grounds.¹⁹⁵ Thus, an independent action may be dismissed if filed within one year, when other Rule 60(b) remedies are available.¹⁹⁶ But commentators have also noted that the more appropriate course for a court to take is to ignore the title on independent actions filed within one year and instead look to the pleading's substance to determine whether it is an appropriate Rule 60(b) motion.¹⁹⁷ If so, then the court may consider the erroneously filed independent action as a motion and reach its merits.¹⁹⁸

Laches works to bar independent actions where the plaintiff's delay in filing the action causes undue prejudice to the other party.¹⁹⁹ There is no express time limitation on independent actions in Rule 60.²⁰⁰ Rather, the drafters intended that the time limitations that apply to all equitable actions apply equally to independent actions.²⁰¹ Thus, the equitable time-bar doctrine "laches" has been applied to independent actions in equity.²⁰² Laches bars relief where a party has not exercised diligence in pursuing a claim or remedy and the opposing party has been prejudiced by this delay.²⁰³ For example, where a party delays bringing a claim and a witness dies in the intervening time, prejudicing the opposing party, laches may bar relief.²⁰⁴ Laches is just one of many equitable limitations that constrain independent actions.²⁰⁵ These limitations present substantial hurdles to a litigant seeking relief from a judgment more than one year after it was entered.²⁰⁶ The first of these hurdles comes when a litigant files the first pleading.

193. See MOORE's, *supra* note 7, at § 60.82[2].

194. See, e.g., *Bankers Mortg. Co. v. Unites States*, 423 F.2d 73, 79 (5th Cir. 1970).

195. FED. R. CIV. P. 60(b).

196. See MOORE's, *supra* note 7, at § 60.82[3] (citing *Taft v. Donellan Jerome, Inc.*, 407 F.2d 807, 808–09 (7th Cir. 1969)).

197. See *id.*

198. See *id.* § 60.60[3].

199. See, e.g., *In re Whitney-Forbes, Inc.*, 770 F.2d 692, 698 (7th Cir. 1985) ("The doctrine of laches applies to such [independent] actions.").

200. See FED. R. CIV. P. 60(b)–(e).

201. See WRIGHT, MILLER & KANE, *supra* note 24, at § 2868 (noting that laches places a temporal limitation on independent actions).

202. See *id.* The advisory committee also noted that "statutes of limitations" might apply to independent actions, but there are no relevant statutes of limitations that apply. See FED. R. CIV. P. 60(b) advisory committee's note (1946), *reprinted in* MOORE's, *supra* note 7, at § 60 App. 11[1].

203. See, e.g., *Ambramson v. Superintendence Co. (In re Casco Chem. Co.)*, 335 F.2d 645, 651 (5th Cir. 1964) (Laches is "time plus prejudicial harm, and the harm is not merely that one loses what he otherwise would have kept, but that delay has subjected him to a disadvantage in asserting and establishing his claimed right or defense.") (citation omitted).

204. WRIGHT, MILLER & KANE, *supra* note 24, at § 2868.

205. See generally *id.*

206. See *id.*

IV. RULE 9(b) REQUIRES PARTICULARIZED FRAUD PLEADING, WHILE *TWOMBLY* AND *IQBAL* REQUIRE PLAUSIBLE PLEADING UNDER RULE 8

Federal Rules of Civil Procedure 8 and 9 set forth the rules for pleading general and special matters. Rule 9(b), in particular, establishes special, heightened standards for pleading fraud claims.²⁰⁷ Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief" for all pleadings stating a claim for relief.²⁰⁸ *Twombly* and *Iqbal* recently announced new, heightened requirements for pleadings subject to Rule 8(a)(2).²⁰⁹ Importantly, a judgment-relief plaintiff's pleading must satisfy both rules to survive dismissal.²¹⁰

A. RULE 9(b) REQUIRES PARTICULARIZED FRAUD PLEADING

Rule 9(b) requires specific averments of the time, place, and content of any fraud allegation,²¹¹ including fraud allegations in independent actions.²¹² Indeed, unlike the general pleading requirements for most claims,²¹³ allegations of "the circumstances constituting fraud"²¹⁴ must be stated with heightened particularity.²¹⁵ Thus, a complaint that merely states conclusory allegations, or allegations that do not contain specific facts, in support of a claim for fraud will not survive a motion to dismiss.²¹⁶ In most cases, a party must allege, with specificity, the identity of the person who made a misrepresentation or omission, the content of the misrepresentation, the place of the misrepresentation, and the date and

207. FED. R. CIV. P. 9.

208. FED. R. CIV. P. 8.

209. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009).

210. See *infra* Part IV.B.

211. FED. R. CIV. P. 9(b); *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) (Rule 9(b) "requires the plaintiff to state 'with particularity' any 'circumstances constituting fraud.' [] This means the who, what, when, where, and how: the first paragraph of any newspaper story.").

212. See *Lone Star Ladies Inv. Club v. Schlotsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) ("Rule 9(b) applies by its plain language to all averments of fraud, whether they are part of a claim of fraud or not."); see also MOORE's, *supra* note 7, at § 9.03[1][d].

213. FED. R. CIV. P. 8(a)(2). But see *Iqbal*, 129 S. Ct. at 1949 (overruling the notice pleading standards set out in *Conley v. Gibson* and increasing the plaintiff's pleading burden in all civil actions). *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007). *Twombly* and *Iqbal* and their impact on pleading standards are discussed *infra*.

214. FED. R. CIV. P. 9(b).

215. *Lone Star*, 238 F.3d at 368; see also *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993) ("Rule 9(b) . . . requires that fraud be pled with particularity. Specifically, the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.") (citation omitted). But see *Walling v. Beverly Enters.*, 476 F.2d 393, 397 (9th Cir. 1973) ("[R]ule 9(b) does not require nor make legitimate the pleading of detailed evidentiary matter. Nor does Rule 9(b) require any particularity in connection with an averment of intent, knowledge or condition of the mind. It only requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.") (internal quotations omitted) (citation omitted).

216. See *DiLeo*, 901 F.2d at 627.

time of the misrepresentation.²¹⁷ A bare bones allegation of fraud, accordingly, is insufficient under Rule 9.²¹⁸

Likewise, a fraud claim founded on “information and belief” will not withstand Rule 9(b) scrutiny.²¹⁹ While allegations made on information and belief will satisfy the general requirements of Rule 8 in some instances, the heightened pleading requirements of Rule 9(b) require more.²²⁰ In some limited instances, however, information and belief pleading may withstand Rule 9 scrutiny.²²¹ For instance, where a plaintiff does not have access to proof of fraud because that proof is “peculiarly” within the defendant’s possession, the Rule’s heightened requirements may be relaxed to a certain extent.²²²

While Rule 9 mandates heightened scrutiny of allegations of the “circumstances constituting fraud,” state-of-mind allegations may be pleaded generally under Rule 9.²²³ Indeed, Rule 9 expressly notes that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”²²⁴ Thus, a party may generally allege that a person intentionally misrepresented a factual matter without the heightened specificity required of other fraud-based allegations.²²⁵ Rule 9(b)’s state-of-mind pleading requirements are akin to Rule 8’s general pleading standard,²²⁶ but “the relaxation of [the Rule’s] specificity requirement for scienter must not be mistaken for license to base claims of fraud on speculation and conclusory allegations.”²²⁷

The purpose of the heightened fraud pleading requirements is to prevent plaintiffs from engaging in a “fishing expedition” to find proof of unfounded allegations through discovery.²²⁸ According to this reasoning, an allegation of fraud against a business is so potentially damaging that a fraud lawsuit should be subject to dismissal at the earliest stage in the

217. *See id.*

218. *See, e.g., id.*

219. *See, e.g., Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972) (“Rule 9(b) pleadings cannot be based on information and belief.”) (internal quotations omitted).

220. *See id.* at 608.

221. *See, e.g., Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2d Cir. 1974), *overruled on other grounds by Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1100 n.9 (1991).

222. *See id.* Additionally, information and belief pleading may support the state of mind allegations in a fraud complaint because those allegations are specifically exempted from Rule 9(b)’s particularity requirements. FED. R. CIV. P. 9(b).

223. *See* FED. R. CIV. P. 9(b).

224. *Id.*

225. *See, e.g., Cramer v. Gen. Tel. & Elecs. Corp.*, 582 F.2d 259, 273 (3d Cir. 1978) (noting that the scienter pleading requirements of 9(b) are “minimal”).

226. *See id.* at 272–73. Neither *Twombly* nor *Iqbal* directly addressed Rule 9(b)’s scienter pleading standards, but courts have long recognized that Rules 8 and 9 must be read together. *See United States v. Nat’l Training & Info. Ctr., Inc.*, 532 F. Supp. 2d 946, 960 (N.D. Ill. 2007) (“[T]he particularity requirement of Rule 9(b) must be read together with the liberal notice pleading standard of Rule 8.”).

227. *See Shields v. Citytrust Bankcorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) (internal quotations omitted).

228. *See United States ex rel. Franklin v. Parke-Davis, Div. of Warner-Lambert Co.*, 147 F. Supp. 2d 39, 46 (D. Mass. 2001).

litigation if the allegation is vague.²²⁹ Some plaintiffs have used allegations of fraud to damage a business or individual with the mere filing of a lawsuit.²³⁰ Rule 9(b)'s requirements recognize this danger and allow courts to dismiss unfounded suits.²³¹ Of course the damage from real fraud is also very substantial to the party who is defrauded and a lawsuit may be a person's only recourse. Also, by raising the pleading bar on fraud claims, Rule 9(b) runs the risk of closing the courthouse door on persons who have been grievously injured. Despite this risk, courts have vigorously enforced Rule 9's heightened standard to dismiss complaints with inadequate, general allegations of fraud.²³²

B. NEW "PLAUSIBILITY" PLEADING STANDARDS GOVERN THE REMAINING INDEPENDENT ACTION ALLEGATIONS

Beyond fraud allegations, a party seeking relief by independent action must plead sufficient allegations to support the remaining equitable elements of the independent action.²³³ And while Rule 9(b) governs allegations of fraud and requires particularity in their pleading, Federal Rule of Civil Procedure 8 governs the other allegations in the independent action.²³⁴ Rule 8 requires that a party's initial pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief."²³⁵ For instance, as discussed above, parties seeking relief from a judgment by independent action based on fraud must allege that they acted diligently to discover the fraud.²³⁶ The allegations of fraud itself are controlled by Rule 9(b)'s particularity requirements,²³⁷ but the diligence allegation is controlled by the less onerous "short and plain statement" requirements of Rule 8(a)(2).²³⁸ What constitutes a short and plain statement showing that the pleader is entitled to relief? The answer has changed dramatically in recent years.²³⁹

229. See *id.*; see also *Hernandez v. Ciba-Geigy Corp. USA*, 200 F.R.D. 285, 290 (S.D. Tex. 2001) ("Rule 9(b) was formulated to ensure that defendants can effectively respond to plaintiffs' allegations, to prevent the filing of baseless complaints to obtain discovery on unknown wrongs, and to protect defendants from unfounded allegations of wrongdoing which might injure their reputations.").

230. See, e.g., *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987) (Rule 9(b) was designed, in part, to minimize strike suits.).

231. See *id.*

232. See, e.g., *Lone Star Ladies Inv. Club v. Schlotsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001).

233. See, e.g., *LinkCo, Inc. v. Akikusa*, 615 F. Supp. 2d 130, 133, 139 (S.D.N.Y. 2009).

234. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009). Rule 8 "governs the pleading standard 'in all civil actions and proceedings in United States district courts.'" *Id.* (citing FED. R. CIV. P. 1).

235. FED. R. CIV. P. 8(a)(2).

236. See *supra* notes 189–92 and accompanying text.

237. See *Cramer v. Gen. Tel. & Elecs. Corp.*, 582 F.2d 259, 273 (3d Cir. 1978). Of course, as discussed, state-of-mind allegations may be averred generally. *Id.*; see also *supra* notes 211–32 and accompanying text.

238. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (citing FED. R. CIV. P. 1); see also FED. R. CIV. P. 8.

239. See, e.g., *Tiscareno v. Anderson*, 639 F.3d 1016, 1025 (10th Cir. 2011), *vacated on other grounds*, 2011 WL 1549519 (Apr. 26, 2011).

After the adoption of the Civil Rules, Rule 8's requirements were interpreted as a "notice pleading" requirement.²⁴⁰ The standard for a proper notice pleading was famously set out by the Supreme Court in *Conley v. Gibson*.²⁴¹ The Court observed that "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."²⁴² This formulation of the notice pleading standard supported the well-accepted idea that cases should be decided on the merits, not on technical errors in the pleadings.²⁴³ Indeed, a pleading was an opportunity to connect allegations of wrongdoing to a particular defendant to put that defendant on notice of the pending claims.²⁴⁴ And while the notice pleading standard allowed plaintiffs a wide berth into the tribunal, subsequent merit-based procedures like summary judgment could always stop a case from proceeding to trial.²⁴⁵ These procedures were preferable to a dismissal on the pleadings because they were based, at minimum, on a discovery record that presumably reflected the merits of the case. Thus, under the notice pleading interpretation of Rule 8, courts were more likely to decide a case on its underlying merits than on the technical mistakes of counsel.²⁴⁶ Two recent Supreme Court decisions have turned this paradigm on its head and redefined what constitutes a sufficient pleading in federal civil cases.²⁴⁷

After fifty years of federal courts operating under the notice pleading standard announced in *Conley v. Gibson*, the Supreme Court revisited Rule 8's pleading requirements in *Bell Atlantic Corp. v. Twombly*.²⁴⁸ The case arose in the context of a motion to dismiss an antitrust complaint.²⁴⁹ The class action plaintiffs alleged that after the breakup of the AT&T telephone company, the remnants of the company (the "Baby Bells") conspired or combined to thwart competitors and refrain from encroach-

240. See, e.g., *Kittay v. Kornstein*, 230 F.3d 531, 541 (2d Cir. 2000) ("Under [Rule 8's] liberal pleading standards, a plaintiff must disclose sufficient information to permit the defendant to have a fair understanding of what the plaintiff is complaining about and to know whether there is a legal basis for recovery.") (internal quotations omitted).

241. See generally *Conley v. Gibson*, 355 U.S. 41 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

242. *Id.* at 45–46.

243. See *id.* at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."); see also Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 18 (2010) (noting that a "bend-over-backwards principle" favored the pleader during the notice pleading regime).

244. See MOORE's, *supra* note 7, at § 8.04[1][a] (citing *Brownlee v. Conine*, 957 F.2d 353, 354 (7th Cir. 1992) (Posner, J.)).

245. See FED. R. CIV. P. 56.

246. See generally *Conley*, 355 U.S. at 48.

247. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 544 (2007).

248. *Twombly*, 550 U.S. at 557.

249. *Id.* at 549.

ing on each other's traditional, geographically defined markets.²⁵⁰ The plaintiffs alleged that the Baby Bells' conspiracy was evidenced by parallel conduct (meaning similar or identical business conduct).²⁵¹ According to the plaintiffs' complaint, over the course of time, the Baby Bells engaged in parallel conduct that discouraged their competitors.²⁵² This conduct included engaging in anticompetitive billing practices, providing inferior network connections, and propagating unfair agreements that all undermined the competition.²⁵³ Moreover, the complaint alleged that the Baby Bells did not conduct business in each other's traditional geographic markets despite congressional authorization to do so.²⁵⁴

The Baby Bells moved for a Rule 12(b)(6) dismissal, and the district court granted the motion, holding that the plaintiffs did not plead sufficient facts to support the Sherman Act's conspiracy requirement.²⁵⁵ In particular, the district court held that mere allegations of parallel conduct do not support an "inference that [the Baby Bells'] actions were the result of a conspiracy."²⁵⁶ The court of appeals reversed the district court holding that a dismissal would be appropriate only where a district court could conclude that "there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."²⁵⁷ The Supreme Court granted certiorari "to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct" and reversed the court of appeals.²⁵⁸

The Supreme Court recognized that the circuit court's confusion stemmed from the long-standing and oft-cited holding of *Conley v. Gibson*.²⁵⁹ The Court overruled *Conley* and held that Rule 8 requires more than a statement that makes a cause of action conceivable.²⁶⁰ Rather, a plaintiff must plead facts that show that a claim is "plausible on its face."²⁶¹ While the Supreme Court stated that it was not requiring "heightened fact pleading of specifics," it went on to reverse the court of appeals.²⁶² The Court reasoned that while the plaintiffs' allegations of parallel conduct made it conceivable that the Baby Bells engaged in a conspiracy, the allegations did not make it *plausible* that the Baby Bells did so.²⁶³

250. *See id.* at 550–51.

251. *See id.* at 551.

252. *See id.*

253. *See id.*

254. *See id.* at 550–51.

255. *See id.* at 552.

256. *Id.*

257. *Id.* at 553.

258. *See id.*

259. *See id.* at 554–55.

260. *See id.* at 563.

261. *See id.* at 556, 566–70.

262. *See id.* at 570.

263. *See id.*

After the Court decided *Twombly*, some confusion remained about the applicability of the heightened Rule 8 pleading standards outside of the antitrust context. In *Ashcroft v. Iqbal*, these questions were definitively answered.²⁶⁴ In *Iqbal*, a Muslim, Pakistani man was arrested and detained in the wake of the September 11, 2001, terrorist attacks.²⁶⁵ Iqbal complained that while in custody for immigration violations, he was subjected to harsh treatment and conditions, including beatings, harassment, and repeated strip searches and body-cavity searches based on the fact that he was a Muslim.²⁶⁶ The particular conditions of Iqbal's captivity stemmed from officials in the United States Justice Department designating him as a "person of high interest" in the September 11th investigation.²⁶⁷

After his release from prison, Iqbal filed a *Bivens* action against a host of federal officials and corrections officers.²⁶⁸ Among the defendants were John Ashcroft, former United States Attorney General, and Robert Mueller, Director of the Federal Bureau of Investigation.²⁶⁹ Iqbal claimed that Ashcroft and Mueller "designated him a person of high interest on account of his race, religion, or national origin in contravention of the First and Fifth Amendments to the Constitution."²⁷⁰ Moreover, the complaint claimed that Ashcroft and Mueller knowingly condoned Iqbal's harsh treatment while in confinement "solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."²⁷¹

Ashcroft and Mueller moved to dismiss Iqbal's complaint for failure to state sufficient allegations to show that they participated in the unconstitutional conduct, and the district court denied the motion.²⁷² Ashcroft and Mueller appealed, and in the intervening time, the Supreme Court decided *Twombly*.²⁷³ The United States Court of Appeals for the Second Circuit decided that the claims in *Iqbal* were not subject to *Twombly*'s plausibility requirement and affirmed the district court's denial of the motion to dismiss. The Supreme Court granted certiorari²⁷⁴ and reversed the court of appeals, holding that *Twombly*'s plausibility requirement applied to any complaint subject to Rule 8(a)(2).²⁷⁵ The Court went on to note that evaluating a complaint under Rule 8 requires a two-step analysis.²⁷⁶ First, a court must disregard conclusory legal allegations in the

264. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942 (2009).

265. *Id.* at 1942.

266. *See id.* at 1944.

267. *See id.* at 1943.

268. *Id.* at 1942.

269. *Id.*

270. *Id.* at 1944.

271. *Id.*

272. *See id.*

273. *See id.*

274. *See id.* at 1944–45.

275. *See id.* at 1949–51.

276. *See id.* at 1949–50.

complaint.²⁷⁷ Second, and after disregarding allegations stated as legal conclusions, a court should evaluate the remaining factual allegations to determine if they state a plausible claim for relief.²⁷⁸ If the facts merely allege the “possibility” that a plaintiff is entitled to relief and do not show that the claim is plausible, the court should dismiss the complaint.²⁷⁹ Using this framework, the Court disregarded Iqbal’s allegations that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to”²⁸⁰ the conditions of his confinement because of Iqbal’s race, religion, or national origin because the Court viewed them as bare legal conclusions not entitled to the presumption of truth given to factual allegations in a complaint.²⁸¹ After disregarding these allegations, the Court evaluated the remaining allegations in the complaint, found that they did not establish a plausible claim of discrimination by Ashcroft and Mueller, and dismissed the complaint.²⁸²

Through *Iqbal* and *Twombly*, the Supreme Court made clear that Rule 8 requires a party to plead factual allegations that make a claim for relief plausible.²⁸³ This heightened standard raises the bar for all potential plaintiffs attempting to plead a claim subject to the Rule. Likewise, Rule 9 sets a high standard for any plaintiff attempting to plead a fraud claim. Combined, these standards are critically important to any party seeking relief from a judgment under Rule 60(d).

V. BECAUSE THE VALUE OF TRUTH OUTWEIGHS THE RISK OF MERITLESS JUDGMENT-RELIEF LITIGATION, THE DISTINCTION BETWEEN INTRINSIC AND EXTRINSIC FRAUD SHOULD BE ELIMINATED

The distinction between intrinsic and extrinsic fraud strikes the wrong balance between judgments that reflect the truth and judgments that are final. Truth is an essential feature of a properly functioning judicial system. Truth, however, is uncovered by the legal system only when issues and disputes are fully and fairly litigated. Indeed, if a party is prevented by the wrongdoing of another party from presenting a claim or defense in court, then the fact finder cannot effectively get to the truth.²⁸⁴ Such situations are especially problematic because society relies on courts to

277. *See id.*

278. *See id.*

279. *See id.* at 1950.

280. *Id.* at 1951.

281. *See id.* at 1950–51. The Court also disregarded allegations that Ashcroft was the “principal architect” and that Mueller was “instrumental” in carrying out this plan. *See id.*

282. *See id.* at 1951–54. *But see*, *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011) (holding that plaintiff’s allegations of materiality in a securities fraud case were plausible pursuant to *Twombly* and *Iqbal*).

283. *See* Miller, *supra* note 243, at 17–20; *see also* Edward A. Hartnett, *Taming Twombly, Even after Iqbal*, 158 U. PA. L. REV. 473, 480–83 (2010).

284. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 70 cmt. a (1982) (“Judgments are taken as finally determining claims because of confidence that the procedure leading to judgment is reasonably effective to ascertain the merits of the controversy.”); Harold C. Dedman, Note, *Intrinsic and Extrinsic Fraud and Relief Against Judgments*, 4 VAND. L.

resolve disputes in a truthful manner. Judgments have long been viewed as the court system's final pronouncement on and resolution of disputed issues of fact.²⁸⁵ Individuals shape their behavior to avoid legal troubles on the belief that if they are accused of wrongdoing, they may rely on the court system to reveal that their actions did indeed comport with the law. Likewise, when someone commits a legal wrong, society relies on the court system to impose liability based on the wrongdoer's real world actions. Thus, whether the ultimate outcome is vindication or condemnation, the function of a judgment is, in large part, to accurately and truthfully account for actions in the real world.²⁸⁶

The value of truth, however, is tempered by the real need for litigation to come to an end. Litigants do not, and should not, expect that the courts provide a forum for a never-ending quest for ultimate truth on any issue.²⁸⁷ Rather, the courts come into a conflict at a defined point in time and exit the conflict at a point sometime after its resolution. This fixed-window model allows for the efficient use of both the courts' time and the litigants' time. The litigation process is controlled through scheduling orders and trial settings and ultimately comes to an end through a final judgment or order.

The virtues of ending disputes and the finality of judgments are well-known.²⁸⁸ Finality allows the litigants to go on with their lives. It also allows the court system to allocate resources to new disputes in need of resolution. The final judgment fixes the rights of the parties and allows them to proceed according to the court-imposed obligations contained in it. Additionally, in the common law system, final judgments and the appellate opinions that sometimes follow them dictate the rights and obligations of individuals who were not part of the litigation. And, final judgments allow society to conduct itself according to the status quo, preventing continual rancor and discord.

Res judicata attempts to strike a proper balance between these concepts, recognizing that finality is important, but that truth can flow only

REV. 338, 338 (1951) (Relief is appropriate where "there has never been a real contest before the court on the subject matter of the suit.").

285. The principle of finality's "enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put at issue and actually determined by them." S. Pac. R.R. v. United States, 168 U.S. 1, 49 (1897); see also Moore & Rogers, *supra* note 57, at 624.

286. See WRIGHT, MILLER & KANE, *supra* note 24, at § 2852 ("Rule 60 is to be liberally construed in order that judgments will reflect the true merits of the case."); see also Dedman, *supra* note 284, at 338.

287. See Temple, *supra* note 16, at 968–70.

288. Judgment finality undoubtedly plays an important role in uncovering the truth through litigation. Indeed, finality incentivizes parties to put on their best case during the first, and typically only, presentation of evidence at trial. In some cases, however, a litigant's best efforts to try her case are undermined by perjury, discovery abuse, or an opposing litigant's otherwise nefarious conduct. In these instances finality serves as a barrier to effectively uncovering the truth through litigation. See *infra* notes 311–19 and accompanying text.

when disputed issues are actually presented to the tribunal.²⁸⁹ Where an issue was, or should have been, raised between the same parties in a previous proceeding, the order disposing of that issue cannot be disturbed.²⁹⁰ But if the issue was not, or could not, have been raised, *res judicata* allows a litigant the opportunity to raise the claim and seek truth on the matter.²⁹¹

The Supreme Court attempted to strike a similar balance between truth and finality when it created the distinction between intrinsic and extrinsic fraud. In *Throckmorton*, the Supreme Court held that relief by independent action was not available for judgments obtained by intrinsic fraud, including fraud perpetrated through perjured testimony and falsified documents.²⁹² By doing so, the Court spawned a rudimentary sorting mechanism for independent actions based on the likelihood that those actions would result in the relitigation of an issue that had been, or should have been, resolved in the original lawsuit. According to this reasoning, allegations of perjury and document falsification levied against testimony and documents examined by a fact-finder at the original trial should not be subject to a second inquiry. Although not expressly a part of the Court's reasoning in *Throckmorton*, the rule was consistent with the premise that allegations of perjury are easily fabricated by a losing party, endlessly perpetuating the litigation in a never ending he-said-she-said.²⁹³ Likewise, claims of document falsification might be drummed up by any losing party through a single witness. To promote finality, these easily concocted claims were stopped at the courthouse door by the Court's bar on intrinsic fraud.²⁹⁴ Claims predicated on extrinsic fraud, however, were allowed to go forward because the complaining party, by some rough measure, did not have an opportunity to present the claim in the first instance.²⁹⁵ This sorting mechanism is predicated on the idea that we should not reopen a case when the *type or category* of fraud *usually* had been or should have been examined at the original trial.²⁹⁶ The mechanism attempted to strike a balance between the truth-seeking function of litigation and the value of not endlessly repeating litigation of the same issues.²⁹⁷ But the distinction was difficult to apply from the beginning and became less practical and equitable as the decades passed.²⁹⁸

Unfortunately, lower courts that adopted *Throckmorton* used the distinction to exclude ever-broader categories from judgment-relief despite

289. See Moore & Rogers, *supra* note 57, at 624-25.

290. See MOORE'S, *supra* note 7, at § 60.81[1][b][iv] (citing *Weldon v. United States*, 70 F.3d 1, 5 (2d Cir. 1995)).

291. *Cf. id.*

292. See *United States v. Throckmorton*, 98 U.S. 61, 65-66, 69 (1878).

293. *Cf. RESTATEMENT (SECOND) OF JUDGMENTS* § 70 cmt. c (1982) (Testimonial perjury "conflicts are easy to propound and difficult to resolve with confidence.").

294. *Throckmorton*, 98 U.S. at 69.

295. See *id.* at 64-66.

296. See *id.* at 66.

297. See *id.* at 68-69.

298. See, e.g., Clark, *supra* note 22, at 542; see also Evans, *supra* note 160, at 1022-25.

the real potential that the issues touched by fraud could not have been litigated in the first instance.²⁹⁹ Although *Throckmorton* was decided in the common law pleading era and perpetuated in the code pleading era, the notice pleading era amplified its categorical approach. This was, at least in part, because of concerns about the costs of discovery and the low threshold for litigants to plead their way into federal court under *Conley*.³⁰⁰ During the notice pleading era, courts relied on the categories to dismiss any independent action complaint that alleged a judgment was obtained as the result of perjury, forged documents, or discovery misrepresentations.³⁰¹ No level of specificity in the pleadings about a party's inability to try an issue because of fraud could theoretically overcome this barrier because the rule *categorically* excluded all intrinsic frauds.³⁰² This allowed the court to avoid new discovery in a closed case, but the cost of this efficiency was undoubtedly the dismissal of independent actions based on serious fraud allegations that prevented the presentation of issues in the original trial.³⁰³ Without a developed record, the court was left to rely on the well-established, though ill-reasoned, dogma that relief should not lie for intrinsic fraud during the entirety of the notice pleading era.³⁰⁴

The distinction has been criticized by commentators and courts alike for decades.³⁰⁵ The problems they note are numerous: the distinction does not explain why parties misled into defaulting should receive more protection than those who are defrauded while participating in litigation;³⁰⁶ courts handcuffed by the distinction found clever ways to provide relief for frauds that were clearly intrinsic, adhering to the nomenclature of the original statement of the rule in *Throckmorton* but ignoring its substance;³⁰⁷ decisions applying the distinction are mired in uncertainty and conflict;³⁰⁸ and the rule is used selectively and irrationally.³⁰⁹ This criticism is well founded in 100 years of conflicting decisions and disorder in the lower courts that stem from problems in both the literal terms of the distinction and disparity in its application.³¹⁰ Accordingly, the distinction should be eliminated for at least three reasons.

299. Intrinsic fraud bars perjury at trial and fraud in the discovery process. See, e.g., *Kahn v. Gen. Motors Corp.*, No. 88 CIV. 2982, 1998 WL 812053, at *2 (S.D.N.Y. Nov. 17, 1998), *aff'd*, 230 F.3d 1374 (Fed. Cir. 1999); see also MOORE's, *supra* note 7, at § 60.81[1][b][iii] (Intrinsic fraud bars "perjury at trial or in discovery proceedings.").

300. See, e.g., *Temple*, *supra* note 16, at 969.

301. See MOORE's, *supra* note 7, at § 60.81[1][b][ii].

302. See *Throckmorton*, 98 U.S. at 64–66.

303. See *Temple*, *supra* note 16, at 970.

304. See *Throckmorton*, 98 U.S. at 66.

305. See, e.g., *St. Pierre v. Edmonds*, 645 P.2d 615, 619 (Utah 1982).

306. See RESTATEMENT (SECOND) OF JUDGMENTS § 70 cmt. c (1982).

307. See *id.*

308. See *Attacking Fraudulently Obtained Judgments*, *supra* note 93, at 399 ("[T]his vexing distinction has been a source of conflict in the courts" since the early 1900s.).

309. See Note, *Post-Term Vacation of Judgments Obtained by Perjury*, 54 COLUM. L. REV. 403, 412 (1954).

310. See, e.g., *Publicker v. Shallcross*, 106 F.2d 949, 952 (3rd Cir. 1939) ("[I]n our judgment . . . the harsh rule of *United States v. Throckmorton* . . . will be modified in accord-

First, the category of intrinsic fraud is conceptually flawed because it ignores the careful balance between the search for truth and finality embodied by *res judicata*.³¹¹ The intrinsic fraud distinction substitutes an arbitrary, categorical analysis of cases for a real evaluation of whether fraud in a particular case prevented the losing party from presenting its claim—a standard that echoes some of the basic tenets of *res judicata*.³¹² The equitable prerequisites of an independent action wisely mirror its core function—preventing the relitigation of that which was or could have been litigated originally.³¹³ In contrast, the fraud categories ignore, in many instances, the basic tenet that a final judgment does not bar litigation of issues that were not or could not have been litigated in the underlying action.³¹⁴ In jurisdictions that adhere to the distinction, parties cannot obtain relief even where an intrinsic fraud was completely undetectable, and thus not litigated, despite their diligence.

This is especially problematic in light of *Throckmorton*'s original, somewhat internally inconsistent observation that fraud is *extrinsic* (and thus actionable) where it prevents an opposing party from presenting a claim.³¹⁵ In *Throckmorton*, Justice Miller wrote that relief from a judgment should be available where a "party has been prevented from presenting all of his case to the court."³¹⁶ The Court provided several examples of conduct that would prevent a party from presenting its case in court (extrinsic fraud): a defendant prevented from knowing about a suit by a plaintiff who then takes a default judgment, a party prevented from presenting a claim by a conniving attorney working with the other

dance with the more salutary doctrine of *Marshall v. Holmes* We believe the truth is more important than the trouble it takes to get it.").

311. At least one commentator suggests that questions surrounding independent action relief from judgments are best resolved by *res judicata* principles. MOORE'S, *supra* note 7, at § 60.81[1][b][iv]. This is sensible because those principles are already reflected in the equitable elements of the independent action. Those elements focus, in large part, on the aggrieved party's ability and diligence to detect and raise the fraud claim in the original action. See *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 79 (5th Cir. 1970).

312. In *United States v. Beggerly*, the Court recognized the interrelationship between independent action relief and *res judicata*, observing that "[i]ndependent actions must, if *Rule 60(b)* is to be interpreted as a coherent whole, be reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of *res judicata*." *United States v. Beggerly*, 524 U.S. 38, 46 (1998) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)).

313. Because of *res judicata*, in some circumstances, "[an independent action plaintiff] may not relitigate [claims] of misrepresentation that she could have litigated, and to a great extent did litigate, in [the original litigation]. Only if [the plaintiff] had had no opportunity to litigate the allegations of fraud . . . could this action go forward." MOORE'S, *supra* note 7, at § 60.81[1][b][iv] n.13 (quoting *Weldon v. United States*, 70 F.3d 1, 5 (2d Cir. 1995)).

314. Importantly, *res judicata* "does not apply to *direct* attacks on judgments. 'Res judicata does not preclude a litigant from making a direct attack [under *Rule 60(b)*] upon the judgment before the court which rendered it.'" *Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985) (emphasis in original). But see *Weldon*, 70 F.3d at 5 ("[Plaintiff's independent action], however, is not direct: the very grounds on which she claims fraud upon the court—the government's alleged misrepresentation and misconduct—were 'raised or should have been raised . . . during the pendency of the earlier case' . . . [t]hus, *res judicata* barred this independent action to void the judgment.").

315. See *United States v. Throckmorton*, 98 U.S. 61, 65–66 (1878).

316. *Id.* at 65.

side, or a false promise to settle a case.³¹⁷ While these are undoubtedly instances where a party should have relief from a judgment, the Court goes on to enumerate supposed “equally well settled” categories of conduct that constitute intrinsic fraud: perjury, presentation of fraudulent evidence, “or for any matter which was actually presented and considered in the judgment assailed.”³¹⁸ There are numerous examples, however, of perjury and fraudulent evidence that would, indeed, prevent a party from presenting her case in court.³¹⁹

For instance, imagine that a corporate representative testifies on behalf of a defendant. The substance of the testimony is peculiarly within the knowledge of the corporation, like subjective awareness of risk in the gross negligence context. At deposition, the witness falsely testifies that the corporation had no knowledge of the particular risk. This perjury is the result of a conspiracy between the officers of the corporation and the witness. Further, assume the plaintiff is diligent in examining the witness, conducting document discovery, and investigating the corporation’s subjective knowledge, but despite the diligence, the plaintiff is unable to detect the perjury or conspiracy. In large part, the deceptive skill of the witness and the defendant helps to conceal the perjury. Accordingly, the plaintiff suffers dismissal of the gross negligence claim or loses at the summary judgment stage. A judgment is signed in favor of the defendant based on the perjured testimony. Several years later, a whistle-blower comes forward with an email from the defendant to the witness exposing the scam. Forensic examination confirms that the email is authentic. This scenario surely shows that the plaintiff was unable to fully present her claims because of the skilled deception of the defendant. And the perjury issue was not “actually presented and considered” in any meaningful sense.³²⁰ But perjury is an enumerated category of intrinsic fraud and not subject to postplenary review.³²¹ Thus, perjury might, in limited instances, satisfy the literal language of the *Throckmorton* standard but still be categorically barred.³²² This internal inconsistency has grown worse as courts of appeals have interpreted and applied *Throckmorton*. The intrinsic fraud category has grown to include discovery fraud.³²³ This is particularly problematic in the context of the nonproduction of docu-

317. *Id.* at 65–66.

318. *Id.* at 66.

319. And unfortunately, the deterrent mechanisms built into the civil system do little to thwart perjury. John L. Watts, *To Tell the Truth: A Qui Tam Action for Perjury in a Civil Proceeding is Necessary to Protect the Integrity of the Civil Judicial System*, 79 TEMP. L. REV. 773, 779–92 (2006). Indeed, “[v]ery rarely will a witness or party in a typical civil suit face criminal prosecution, even for clear cases of perjury.” *Id.* at 782. Besides the virtual absence of criminal prosecutions for civil perjury, ethical rules, social and moral considerations, and cross examination are also ineffective at uncovering perjury in many instances. *Id.* at 779–92.

320. *Throckmorton*, 98 U.S. at 66.

321. *See id.*

322. *See id.*

323. *See, e.g., Kahn v. Gen. Motors Corp.*, No. 88 CIV. 2982, 1998 WL 812053, at *2 (S.D.N.Y. Nov. 17, 1998), *aff’d*, 230 F.3d 1374 (Fed. Cir. 1999).

ments. Where documents are peculiarly within the control of the opposing party, a claimant must rely on the candor of an adversary in disclosing relevant materials.³²⁴ If the claimant has reason to suspect that materials are being withheld, she may file a motion to compel and even obtain a court order to compel production.³²⁵ But compliance with these orders is usually verified by sworn statements from the adversary.³²⁶ If the adversary fraudulently represents that they have produced all documents within the scope of the order and the judge is satisfied, the claimant may not be able to do anything else to obtain evidence.³²⁷ When this vacuum of proof prevents a claimant from establishing her claim and she discovers the fraud many years later, it would seem to put her squarely within *Throckmorton's* command that judgments should not survive if fraud by an opposing party "prevented [a claimant] from presenting all of [her] case to the court."³²⁸ But because, according to lower courts, intrinsic fraud includes perjury in discovery proceedings, relief is not possible.³²⁹ Thus, in addition to the dissonance between the intrinsic fraud category and the truth-finding features of *res judicata*, inconsistencies in *Throckmorton* itself support abolishing the distinction.³³⁰

The second reason to abolish the distinction is that the fraud categories are applied inconsistently, creating an unwarranted disparity of outcomes in similar cases. There are, of course, circuits and states that do not observe the distinction between intrinsic and extrinsic fraud.³³¹ This creates one breed of disparity. But even among courts that adhere to the distinction, disparate outcomes result from seemingly similar facts. The inconsistency stems, in large part, from *Throckmorton's* holding that a judgment should not withstand an attack based on fraud that prevented a party from presenting a claim.³³² Some courts have used this language as wiggle room, holding that where perjury (or other intrinsic fraud) prevents the presentation of a claim, it should be treated like extrinsic fraud, despite its original categorization.³³³ This same scenario could arise in

324. Gerald G. Glaser, *A New Law of "Supply and Demand" in Discovery*, 69 A.B.A. J. 320, 321 (1983).

325. See FED. R. CIV. P. 37(a).

326. See, e.g., *Fairfield Fin. Mortg. Group v. Luca*, No. CV06-5962, 2008 U.S. Dist. LEXIS 94159, at *3 (E.D.N.Y. Nov. 19, 2008).

327. See *id.*

328. *United States v. Throckmorton*, 98 U.S. 61, 66 (1878).

329. See *Kahn v. Gen. Motors Corp.*, No. 88 CIV. 2982, 1998 WL 812053, at *2 (S.D.N.Y. Nov. 17, 1998), *aff'd*, 230 F.3d 1374 (Fed. Cir. 1999).

330. *Shammas v. Shammas*, 88 A.2d 204, 208-09 (N.J. 1952) (Brennan, J.) ("[W]e agree that it is 'a journey into futility to attempt a distinction between extrinsic and intrinsic matter' . . . Plainly, the encouragement of vexatious litigation is the lesser evil. We prefer to follow the equity of the matter and to take away an unjust judgment obtained by vital perjury when the injustice and inequity of allowing it to stand are made evident.").

331. See *Gleason v. Jandrucko*, 860 F.2d 556, 560 (2d Cir. 1988) (mentioning in dicta that the distinction is not viable); *Publicker v. Shallcross*, 106 F.2d 949, 950-52 (3d Cir. 1939).

332. See *Throckmorton*, 98 U.S. at 66.

333. Even the Supreme Court took this liberty only a few years after *Throckmorton* was decided. See *Marshall v. Holmes*, 141 U.S. 589, 596 (1891); see also RESTATEMENT (SECOND) OF JUDGMENTS § 70 cmt. c (1982).

the context of discovery fraud allegations. If the fraud prevents a party from presenting a claim, some courts have held that the misrepresentations in discovery are actionable.³³⁴ So despite the adherence to the intrinsic and extrinsic labels, some courts effectively circumvent the distinction.³³⁵ Other courts adhere to it rigidly.³³⁶ Thus, courts treat litigants in seemingly similar factual situations disparately.

Because of this disparate application, litigants have no certainty, as a practical matter, that a judgment is really final. A court may dismiss an independent action for perjury based on the fact that perjury is part of the intrinsic category,³³⁷ or the court might find that perjury prevented the presentation of a claim and relieve the aggrieved party from the effects of the judgment.³³⁸ Whether the court does this is largely based on the court's view of factors and equities that have little, if nothing, to do with the categories through which it will ultimately state (or mask) its decision.³³⁹ This is problematic on many levels. First, the justification for the distinction supposedly lies in its ability to provide more finality and certainty in judgments.³⁴⁰ But when a judgment is attacked because of fraud, whether it is truly final or subject to reopening cannot be determined by a quick glance at a list of intrinsic and extrinsic frauds. Instead, the court's decision could turn on a number of extra-distinction factors.³⁴¹ As a result, the distinction introduces an unacceptable level of uncertainty about whether a judgment is subject to reopening into the system. Second, similarly situated litigants are treated disparately. They may be treated disparately because their cases arise in circuits that disagree on the distinction.³⁴² Worse yet, they could be treated disparately in the same courthouse because of conflicting interpretations of the troubled distinction.³⁴³ Third, the presence of such doctrinal disarray leads to confusion and difficulty for judges attempting to apply the muddled standards. Even if a judge wanted to adhere to the distinction, it would be difficult to do so in many jurisdictions because of the conflicting precedent. Supposedly, all of these problems are worth the cost because the alternative is protracted, never-ending litigation on matters that should have been final long ago.³⁴⁴ But existing and new pleading standards provide a threshold barrier that will effectively screen most, if not all, unnecessarily repetitious litigation at the motion to dismiss phase.

334. See *Throckmorton*, 98 U.S. at 65–66. Cf., e.g., *MMAR Group, Inc. v. Dow Jones & Co.*, 187 F.R.D. 282, 292 (S.D. Tex. 1999).

335. RESTATEMENT (SECOND) OF JUDGMENTS § 70 cmt. c (1982).

336. See *id.*

337. See *Gleason v. Jandrucko*, 860 F.2d 556, 559–60 (2nd Cir. 1988).

338. See *Leber-Krebs, Inc. v. Capitol Records*, 779 F.2d 895, 899–900 (2d. Cir. 1985).

339. RESTATEMENT (SECOND) OF JUDGMENTS § 70 cmt. c (1982).

340. See *United States v. Throckmorton*, 98 U.S. 61, 65–66 (1878).

341. See RESTATEMENT (SECOND) OF JUDGMENTS § 70 cmt. c (1982).

342. Compare *Publicker v. Shallcross*, 106 F.2d 949, 950–52 (3d Cir. 1939), with *Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters*, 675 F.2d 1349, 1358 (4th Cir. 1982).

343. Compare *Gleason v. Jandrucko*, 860 F.2d 556; 559–60 (2d. Cir. 1988), with *Leber-Krebs*, 779 F.2d at 899–900.

344. See *Throckmorton*, 98 U.S. at 68–69.

Contemporary pleading standards provide the third reason to abolish the distinction because they reduce the risk that doing so will result in costly relitigation of cases.³⁴⁵ Federal Rule of Civil Procedure 12(b)(6) provides an efficient mechanism to dispose of lawsuits (including independent actions) that do not state a valid claim for relief.³⁴⁶ Recently, the motion to dismiss was given real teeth (or bigger teeth) through the pleading standards announced in *Twombly* and *Iqbal*.³⁴⁷ The early empirical evidence suggests that courts are employing *Twombly* and *Iqbal* to dismiss actions with increasing frequency at the pleadings stage.³⁴⁸ The inconveniences of, and resources devoted to, litigation dismissed at the pleadings stage are minimal.³⁴⁹ Indeed, a party files a complaint, the opposing party moves to dismiss, and several briefs of reasonable length are exchanged. The judge then decides whether the litigation proceeds or stops in its tracks—before discovery. This is critical because complaints about the cost and expense of relitigation generally refer to the admittedly expensive discovery process.³⁵⁰ Thus, any screening mechanism that effectively protects litigants from costs, and courts from increased burdens, has to be in place before discovery.

During the notice pleading era, the fear of costly relitigation was, in part, well-founded. Rule 9(b) required, and still requires, that a party state fraud allegations with particularity, including fraud allegations in an independent action.³⁵¹ But during the *Conley* era, the remaining independent action allegations (related, in large part, to the lack of previous opportunities to litigate the fraud) only needed to satisfy *Conley*'s notice pleading standard.³⁵² Thus, pleading any set of facts that was consistent with a party acting diligently to discover the fraud, without negligence, and the other equitable requirements was satisfactory. Assuming that the party pleaded an extrinsic fraud, the case would go forward to discovery. This system placed the emphasis on the categories as a screening mechanism; categorizing frauds provided a bulwark against unnecessary relitigation of some cases at the expense of dismissing cases that had never seen a fair day in court. But after *Twombly* and *Iqbal*, courts have a new,

345. Even before the increased pleading standards, experience has shown that out-of-control relitigation does not occur in jurisdictions where there is no distinction. See Clark, *supra* note 22, at 551–53.

346. See FED. R. CIV. P. 12(b)(6).

347. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–57 (2006).

348. Indeed, the empirical evidence suggests that the new screening mechanism will be effective. The rate of 12(b)(6) dismissals has increased since the court decided *Twombly* and *Iqbal*. As some commentators have noted, this may have varying, unintended, and negative consequences for civil litigation in the federal courts. But whatever the effect on access to justice may be for civil litigants, empirical evidence plausibility requirement of Rule 8, coupled with 9(b)'s already stringent fraud pleading requirements, gives the 12(b)(6) motion real teeth for screening independent actions. See Miller, *supra* note 243, at 20–21.

349. See *Twombly*, 550 U.S. at 559.

350. See *id.*

351. See FED. R. CIV. P. 9(b).

352. See *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957).

more effective screening mechanism for the nonfraud allegations, and thus, the independent action as a whole.

Twombly and *Iqbal* changed the game for the nonfraud independent action allegations. Beyond alleging fraud, parties seeking a judgment must *plausibly* allege that they acted diligently to discover the fraud, that the fraud was material to the claim or defense, and that the action satisfies the other equitable requirements.³⁵³ Accordingly, these allegations cannot be conclusory, and they must be sufficiently factually specific.³⁵⁴ The increased focus on the specificity of the nonfraud allegations minimizes the risk of unnecessary relitigation.³⁵⁵ If parties cannot detail the means through which they were prevented from fairly presenting their claim, then the case is dismissed before discovery. If, on the other hand, they are able to adequately detail that they acted diligently but were still unable to discover the fraud, and that the fraud prevented a fair presentation of the case, the independent action survives.³⁵⁶ Likewise, the party seeking relief must plausibly plead that the judgment is manifestly unconscionable or a gross injustice.³⁵⁷ This new, meaningful sorting mechanism strips the categories of any remaining value that they had and replaces them with a system that more adequately balances litigation cost and the need for all issues to have their day in court. This is, in large part, because the nature of the nonfraud allegations revolves around whether the issues were, or should have been, litigated in the original lawsuit.

Thus, in place of the intrinsic and extrinsic categories that roughly and ineffectively identified categories of fraud that should have been detected and litigated in the first instance, plausibility screening allows courts to *actually* identify such cases at the pleading stage. This development allows courts to openly do what many have done for years behind the mask of the categories—screen independent actions based on whether the party had a fair shot to discover and present the issue in the original lawsuit.³⁵⁸ This approach is consistent with the call of some commentators and implicit signals from the Supreme Court for independent action relief to more closely trace the contours of *res judicata*.³⁵⁹

353. The courts are already employing the plausibility standard in the context of independent actions. See, e.g., *LinkCo, Inc. v. Akikusa*, 615 F. Supp. 2d 130, 133–34 (S.D.N.Y. 2009) (party must plausibly allege independent action claim).

354. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009).

355. See Luke Meier, *Why Twombly Is Good Law (But Poorly Drafted) and Iqbal Will Be Overturned*, 87 IND. L.J. (forthcoming 2012) (“*Twombly* was a case about the factual specificity, or the lack thereof, in the plaintiffs’ complaint.”).

356. But what if the party seeking relief from a judgment simply fabricates fraud allegations to advance to discovery from the pleadings stage to impose a burden on the opposing party? Ultimately, the fabrication could be exposed by the other party during discovery and then significant monetary sanctions are available pursuant to Rule 11. See FED. R. CIV. P. 11. This is a significant deterrent to pleading fabricated fraud claims in an independent action and bolsters the efficacy of Rule 9(b)’s heightened pleading standard.

357. See *United States v. Beggerly*, 524 U.S. 38, 46 (1998).

358. RESTATEMENT (SECOND) OF JUDGMENTS § 70 cmt. c (1982).

359. Compare MOORE’S, *supra* note 7, at § 60.81[1][b][iv] (principles of *res judicata* are better to resolve judgment-relief questions than the distinction between intrinsic and extrinsic fraud), with *Beggerly*, 524 U.S. at 46 (“Independent actions must . . . be reserved for

Abolishing the intrinsic and extrinsic categories through *Twombly* and *Iqbal*'s effective screening mechanism would minimize disparity between similarly situated litigants. First, abolishing the distinction would resolve a circuit split,³⁶⁰ and thus, litigants across the country would face a similar judgment-relief standard when asserting fraud claims. Second, abolishing the distinction allows courts to honestly and openly state their reasons for dismissing independent actions. This in itself would lead to more consistent outcomes. For instance, in the current system some courts have held that perjury may be extrinsic fraud where it prevents a claim from being presented, but other courts have flatly held that perjury is always an intrinsic fraud.³⁶¹ If the distinction were abolished, the emphasis would shift to the nonfraud allegations in each individual perjury case to determine whether the fraud was detectable through diligence and whether the perjured testimony likely affected the outcome. Thus, if two perjury cases resulted in different outcomes, the holdings would distinguish the cases on their *actual facts*, not arbitrary categories. This is likely to lead to both consistent outcomes and more harmonious precedent.

Additionally, advancements in both the availability and quality of the proof necessary to sustain an independent action dovetail with the new, heightened pleading requirements. Indeed, modern advances in the availability and reliability of proof have increased a party's ability to expose fraud. These advances can also definitively demonstrate that a party could not have tried the issue in the underlying case. Of particular note, modern forensic document analysis allows experts to determine with near-certainty if a document is forged.³⁶² Similarly, a vast amount of data created by computer users can confirm or dispel a perjury allegation and may not be discovered until many years after a judgment is final.

For example, imagine that an executive testifies in a commercial dispute to the truth of proposition Y. Based on this testimony, the executive's company obtains a judgment in its favor. Many years later, a missing computer backup tape is discovered containing an email authored by the executive showing that, at or before the time he testified, he knew proposition Y to be false. Computer forensics experts confirm that the tape and email are authentic. Under the intrinsic fraud bar, the allegation of perjury would not support an independent action, even where the plaintiff demonstrated that she acted diligently through forensic evidence. Thus, the judgment would persevere despite hard scientific proof that it

those cases of injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of *res judicata*." (internal quotations omitted).

360. Compare *Publicker v. Shallcross*, 106 F.2d 949, 950–52 (3d Cir. 1939), with *Great Coastal Express v. Int'l Bhd. of Teamsters*, 675 F.2d 1349, 1358 (4th Cir. 1982).

361. Compare *Publicker*, 106 F.2d at 950–52, with *Great Coastal Express*, 675 F.2d at 1358.

362. See Jennifer Scillitoe, *Questioned Documents—Still a Vital Forensic Tool*, LAB NEWS.CO.UK, http://www.labnews.co.uk/feature_archive.php/5634/5 (last visited May 29, 2011).

was obtained by fraud and the issues were never tested in the original litigation.

Of course, this was not the state of the world when the Court decided *Throckmorton*.³⁶³ Allegations of perjury were almost always supported by the testimony of a new witness claiming to know some fact that demonstrated that the previous witness's testimony was false. Thus, relief from judgments based on a perjury allegation quickly devolved into a he-said-she-said. Because the loser in the previous judgment could always attempt to drum up a witness to undermine the testimony supporting the previous judgment, courts were, perhaps rightfully, concerned that litigation on any particular matter could be endless.³⁶⁴ But modern forensic science and a wealth of hard, nontestimonial proof has altered this landscape.

These same developments undermine the intrinsic fraud bar on relief from judgments obtained through discovery, misrepresentations, and omissions. If a party destroys documents that are material to a lawsuit, those documents may live on in perpetuity on computer backups. These backups may be located on the premises of the fraudulent actor, or they might very well be located on the premises of a computer or server company operating an offsite "cloud" backup facility. Although the documents may not come to light during litigation, this does not mean they will never be discovered. Assuming the party deprived of the documents loses the lawsuit because of the nonproduction and that the losing party acts diligently to procure them both in the lawsuit and after the judgment, the winning party should not benefit from its fraud. But according to the reasoning of *Throckmorton*'s progeny, the fraudulent actor is protected because discovery omissions are intrinsic fraud. The category, by its literal terms, would bar relitigation even in the face of *undisputed* forensic proof that the other party willfully destroyed and did not produce the documents. Thus, the distinction is inaccurate and should be abolished.

The distinction between intrinsic and extrinsic fraud should be abolished. To do so, the Supreme Court could resolve the current circuit split. Short of that, the distinction could be abolished through the rulemaking process. Judgments should reflect a process based on the values of integrity, candor, and accuracy, even where those values trump the value of finality in judgments. Indeed, any effective judgment-relief framework should be premised on the idea that the "truth is more important than the trouble it takes to get it."³⁶⁵ Accordingly, the Court should finally put the distinction out of its misery.

363. See *United States v. Throckmorton*, 98 U.S. 61, 69 (1878).

364. But see *Shammas v. Shammas*, 88 A.2d 204, 208–09 (N.J. 1952) (Brennan, J.) ("The notion that repeated retrials of cases may be expected to follow the setting aside of judgments rendered on false testimony will not withstand critical analysis. Rather it is more logical to anticipate that the guilty litigant committing or suborning testimony will not risk pursuing the cause further.").

365. *Publicker*, 106 F.2d at 952.

